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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STATE OF CALIFORNIA, acting by and through the Department of Transportation, et al.,

Petitioners,

v.

NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, etc., et al.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California

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80 pp

QUESTIONS PRESENTED

1. Whether the State of California has inherent power to regulate outdoor advertising signs located on Indian lands but directed toward a state (interstate) highway, and thus impacting the safety and aesthetics of the public using the highway.

2. Whether, if the State of California has the power to regulate outdoor advertising signs located on Indian lands and directed toward a state highway, the power has been preempted by the Highway Beautification Act whose purpose was to curtail the proliferation of signs.

PARTIES

This case was consolidated with *Desert Outdoor Advertising, Inc.* v. *Naegele Outdoor Advertising Company of California* (Riverside County Superior Court No. 137500). It is our understanding that Desert Outdoor Advertising, Inc., has or will file a Petition for Writ of Certiorari.

The Morongo Band of Mission Indians appeared as amicus curiae.

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Petitioners,

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NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, etc., et al.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California

The California Department of Transportation petitions for a Writ of Certiorari to review the judgment of the Supreme Court of the State of California in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California (Appen. A, *infra*) is reported at 38 Cal.3d 509 [698 P.2d 150, 213 Cal.Rptr. 247]. The Supreme Court modified the opinion (Appen. B, *infra*) and denied re-

hearing on July 10, 1985. The modification is reported at 38 Cal.3d 912(a). The opinion of the Court of Appeals, Fourth District (Appen. C, *infra*) is not officially reported but is reported at 199 Cal.Rptr. 605.

JURISDICTION

The judgment of the Supreme Court of the State of California (Appen. A, *infra*) was entered on May 2, 1985. A petition for rehearing was denied on July 10, 1985 (Appen. C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, section 8, clause 3, of the United States Constitution provides in relevant part:

> "[The Congress shall have power] to regulate commerce . . . with the Indian tribes;"

2. Article VI, clause 2, of the United States Constitution provides in pertinent part as follows:

> "This Constitution, and the laws of the United States . . . shall be the supreme law of the land . . . ."

3. The Highway Beautification Act (23 U.S.C. § 131(h) and (k); entire section appears in Appen. D, *infra*) provides in pertinent part as follows:

> "(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary."

"(k) . . . nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section."

4. California Business and Professions Code section 5226 (entire section appears in Appen. E, *infra*), provides in pertinent part:

"The regulation of advertising displays adjacent to any interstate highway or primary highway . . . is hereby declared to be necessary to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively, recognizing that a reasonable freedom to advertise is necessary to attain such objectives. . . ."

STATEMENT OF THE CASE

The Morongo Band of Mission Indians entered into an agreement with the respondent, Naegele Outdoor Advertising Company of California, to install, construct, operate and maintain 15 outdoor advertising structures located on Indian land adjacent to Interstate 10. The petitioner, California Department of Transportation (hereafter Department), notified respondent, Naegele Outdoor Advertising Company (hereafter Naegele), that the Department would enforce California's Outdoor Advertising Act. The petitioner Department cited 16 displays. On July 10, 1978, the petitioner filed a com-

plaint and motion for preliminary and permanent injunction against respondent Naegele. A preliminary injunction was granted August 1, 1978. The Department's motion for summary judgment was granted November 6, 1981.

The summary judgment was affirmed by the California Court of Appeal, Fourth District, Division Two, on February 28, 1984 (Appen. C, *infra*).

The California Supreme Court reversed the summary judgment on May 2, 1985 (Appen. A, *infra*, 38 Cal.3d 509 [698 P.2d 150, 213 Cal.Rptr. 247]). The California Supreme Court denied the Department's petition for rehearing and slightly modified the opinion on July 10, 1985 (Appen. B, *infra*, 38 Cal.3d 912(a)).

The gist of the opinion was that the congressional intent of the Federal Highway Beautification Act (23 U.S.C. § 131) was to either leave Indian reservations entirely unregulated or more likely to repose exclusive jurisdiction to ensure compliance with federal agencies.

STATEMENT OF REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. Contrary to decisions by this Court, the state's interest in regulating Indian land was not given appropriate weight and no real inquiry was made to determine if the exercise of authority would violate federal law.

The California Supreme Court has held that the right of the state to regulate billboards adjacent to state (interstate) highways has been preempted by the Highway Beautification Act of 1965 (23 U.S.C. § 131). Contrary to several opinions of this Honorable Court, the impor-

tance of this state interest (protection of travelers on a state highway) has been given little or no weight. There has been no balancing of this state interest with the interests of the federal government or the Indians. Any detailed look at these respective interests would show that the state's interest is strong and the federal and Indian interests are weak.

For over 20 years this Honorable Court has stated that ". . . [S]tate laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by Federal law." (*Organized Village of Kake* v. *Egan* (1962) 369 U.S. 60 at p. 75.)

This Honorable Court has thus required a ". . . particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." (*White Mountain Apache Tribe* v. *Backer* (1980) 448 U.S. 136 at P. 145.) "The State's interest in exercising its regulatory authority over the activity in question must be examined and given appropriate weight." (*Ramah Navajo School Bd.* v. *Bureau of Revenue of New Mexico* (1982) 458 U.S. 832 at p. 838.)

In the instant case, the California Supreme Court's only recognition of the state's interest was the mention of the California code section (Bus. & Prof. Code, § 5226) which states that regulation of advertising displays is declared "necessary to promote the public safety, health, welfare, convenience and enjoyment of

public travel . . . and to insure that information in the specific interest of the traveling public is presented safely and effectively . . . ." (Appen. A, p. 20). It also mentioned that regulations dealing with size, spacing and location are safety measures (Appen. A, p. 20). There is no further mention of the state's interest or any balancing of this interest against the federal or Indian interest.

The gist of the California Supreme Court's determination of the federal interest dealt with the perceived thought that Congress either did not want any regulation of Indian land or wanted regulation only by the federal government. Nowhere is there a discussion or consideration of the fact that the Highway Beautification Act was designed to stop the proliferation of billboards, that states were specifically not prohibited from further restrictions on billboards (23 U.S.C. § 131(k)), nor any indication of how the state's restrictions on billboards would frustrate the intent of Congress to reduce such proliferation.

The only other mention of federal interest is that there are general federal regulations (25 C.F.R. § 162 et seq.) relating to the leasing of Indian lands (Appen. A, pp. 30, 31, fn. 9). Again there is no mention of any conflict with this general authority.

The Indians' interest is primarily pecuniary, since their reservation is poor and the highest and best use of the property adjacent to Interstate 10 is outdoor advertising directed off the reservation toward the travelers on Interstate 10.

Thus, without balancing these interests and determin-

ing where, if at all, state regulation would interfere with the objectives of the Highway Beautification Act, the California Supreme Court held that the Highway Beautification Act preempted the state law designed to protect travelers on the state's own highways. If this is the law, then we are back to the clarity of Chief Justice John Marshall's concept in *Worcester* v. *Georgia* (1832) 6 Pet. 515, 556–557, to the effect that only the federal government can regulate Indians.

2. This case should clarify the importance of off-reservation impacts in analyzing preemption, and clearly demonstrate that the impacts may be nonphysical, such as a sight impact here which affects safety and aesthetics.

This case presents the opportunity to further clarify the statements in recent cases stating that impacts off the reservation are important. (*New Mexico* v. *Mescalero Apache Tribe* (1983) 462 U.S. 324 at p. 336.)

This Honorable Court has held that sales of liquor (*Rice* v. *Rehner* (1983) 463 U.S. 713) and conservation (*Puyallup Tribe* v. *Washington Game Dept.* (1977) 433 U.S. 165) are two impacts that should be considered. This case involves a nonphysical but important off-reservation impact—safety of and view by the traveling public on state highways. This is particularly critical when, as here, the value was created by the highway and the billboards are designed and aimed at the public on the highways. The importance of this off-reservation element, which should weigh heavily in balancing the relevant federal, tribal and state interests, can be clarified by this case.

3. This case may well lead to a proliferation of billboards on Indian land and will lead to much litigation.

This case, if allowed to stand, will have ramifications not only in California but in every state with Indian reservations. Even if the case is not followed, it stands to reason that because of the exemption from restrictions authorized here, and the money to be made from outdoor advertising, many cases will be litigated over the issue of state control of outdoor advertising on Indian reservations. If the present case is followed, the result will be a proliferation of billboards contrary to the intent of the Highway Beautification Act.

CONCLUSION

This case will set a precedent not only in the narrow but important area of outdoor advertising on Indian reservations, but also in the requirements for the depth of consideration of the federal, Indian and state interests involved in a consideration of preemption. A clear indication from this Honorable Court that one must look beneath the superficial interests in order to arrive at a true balance will result in more equitable treatment of the parties involved.

Wherefore, your petitioner respectfully requests that this Writ of Certiorari be granted.

Respectfully submitted,

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OCTOBER 1985

APPENDIX A

COPY

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION, *Plaintiff and Respondent,* v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., *Defendant and Appelant.*	L.A. 31911 (Super.Ct.No. 126069)
DESERT OUTDOOR ADVERTISING, INC., *Plaintiff and Respondent,* v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., *Defendant and Appelant.*	(Super.Ct.No. 137500)

This case presents the question whether the State of California may regulate billboards on Indian reservations. Upon examination of the statutes, legislative history, and precedents involved, we conclude that the state's regulatory authority is preempted by federal law.

This consolidated appeal stems from two separate judgments entered after the trial court granted each

1.

SEE CONCURRING OPINION

plaintiff's motion for summary judgment. Both cases, tried separately below, raise substantially the same issues and involve the same defendant. Because resolution of these issues will have a significant effect on the Morongo Band of Mission Indians, its request to file a brief amicus curiae was granted.

The Morongo Band of Mission Indians (Band) is a federaly recognized Indian tribe, and is the beneficial owner of the Morongo Indian Reservation, consisting of approximately 32,300 acres of land located in Riverside County, California. The Morongo Indian Reservation was created by a series of seven executive orders of various Presidents of the United States, one presidential proclamation, one federal statute, and one deed, beginning in 1876 and ending in 1948. Under Patent Number 172786, the United States declared it will hold the said tracts of land ". . . in trust for the sole use and benefit of the said Morongo Band or Village of Indians, according to the laws of California . . . ."

The reservation lies astride a narrow pass between the San Bernardino and San Jacinto Mountain Ranges. As a result only a small portion of the land is located on the plain suitable for economic development. These relatively few acres lie adjacent to Interstate Highway 10, connecting Los Angeles to popular Southern California desert communities.

In addition to the interstate highway, the reservation is crossed by a main line of the Southern Pacific Railroad, the Colorado River Aqueduct, major oil transmission pipelines, natural gas pipelines, and numerous electrical transmission lines, all of which serve the metropolitan Los Angeles area without any significant benefit to the reservation or its residents. The reservation's few natural resources yield little income so that, despite the Band's apparent advantageous location, its economy is depressed. Many of its members are unemployed and live in poverty.

For many years, the Band has derived a major part of its income from outdoor advertising activities. The Band's general membership has determined that the highest and best use of reservation land adjacent to Interstate 10 is for outdoor advertising. In a 1977 appraisal report, the Southern California Appraisal Office of the Bureau of Indian Affairs came to the same conclusion.

Accordingly, the Band's general membership delegated to its tribal council authority to negotiate agreements for an outdoor advertising business. The Band leased some of this reservation land to non-Indian firms who operated billboards there until 1977. In 1977 the Band solicited proposals for further leases from several non-Indian firms including Naegele Outdoor Advertising Company of California, Inc. (Naegele) and Desert Outdoor Advertising, Inc. (Desert). Naegele's bid was selected and a lease agreement followed.

Pursuant to title 25 of the United States Code, the Department of the Interior (Interior) must approve

such leases before they become effective. (25 U.S.C. § 415.) Upon submission, approval was denied because the lease's purpose, in the Sacramento area director's opinion, would have violated the Highway Beautification Act (23 U.S.C. § 131 et seq.) and California's Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.). The Band appealed this decision and the Interior Board of Indian Affairs reversed. In its opinion, the board concluded that the provisions of the Highway Beautification Act do not apply to Indian reservations and that California's Outdoor Advertising Act cannot be enforced on tribal Indian lands. (Administrative Appeal of the Morongo Band of Mission Indians v. Area Director, Sacramento Area Office (1979) 86 Interior Dec. 380 (Admin. Appeal).)

During the pendency of the Interior appeal, on March 30, 1978, the Band entered into an agency agreement [1] with Naegele. This agreement provided for the installation, construction, operation and maintenance of 15 outdoor advertising structures located on reservation land. On June 27, 1978, the California Department of Transportation (Department) notified Naegele of its intention to apply and enforce California's Outdoor Advertising Act.

Despite the Department's warning and the implication that the displays would violate the Outdoor Adver-

[1] We take judicial notice of the fact that this agency agreement was approved on or about February 2, 1984, by the Bureau of Indian Affairs.

tising Act, 16 billboards were erected on reservation land. The state outdoor advertising inspector ultimately issued citations for all 16 displays.

On July 10, 1978, the People of the State of California, acting by and through the Department, filed a complaint and motion for preliminary and permanent injunction against Naegele. The complaint alleged Naegele was in control of 16 outdoor advertising structures located adjacent to Interstate Highway 10 in Riverside County. These structures were in violation of section 5350 of the Business and Professions Code, requiring display permits. Additionally these displays were situated in violation of various provisions of the Outdoor Advertising Act. The Department identified these displays as a public nuisance within the meaning of Business and Professions Code section 5461.

The preliminary injunction was granted on August 1, 1978. And, on November 6, 1981, in accordance with the Department's motion, summary judgment resulted.

Desert's action, here consolidated with that of the Department, was initially filed on June 26, 1980. In its first amended complaint of December 12, 1980, Desert alleged causes of action for nuisance, unfair competition, intentional interference with prospective economic benefit and negligent interference with prospective economic benefit. Naegele's demurrer was sustained as to the nuisance cause of action. The court dismissed both causes of action for interference and granted Desert's motion for summary judgment on the unfair competition cause of action. In its order the court enjoined

Naegele from maintaining advertising structures on the reservation without complying with the Outdoor Advertising Act. Naegele was ordered to remove all noncomplying structures. The enforcement of this judgment was stayed pending appeal.

The question we must answer on appeal is whether the Department can, through the Outdoor Advertising Act, regulate billboards erected on reservation land held in trust by the United States for the beneficial use of the Band. This inquiry requires us to consider several subsidiary questions.

In 1832, Chief Justice Marshall opined, with enviable clarity, that Indian tribes were wholly distinct nations within whose boundaries "the laws of [a State] can have no force." (Worcester v. Georgia (1832) 6 Pet. 515, 561.) In the interim, however, the United States Supreme Court has departed from this view and acknowledged certain limitations upon tribal sovereignty. For example, " '[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and *is subject to complete defeasance.*' " (Rice v. Rehner (1983) ____ U.S. ____ [103 S.Ct. 3291, 3295], quoting United States v. Wheeler (1978) 435 U.S. 313, 323, with added emphasis.)

It is apparent that Congress may delegate its power over the governance of Indian reservations to the states. The Department argues that, in the context of outdoor advertising, Congress has done so through the Highway Beautification Act.

The Highway Beautification Act of 1965 was enacted to provide for scenic development and road beautification of the federal-aid highway systems. Title I of the act (23 U.S.C. § 131) contains requirements for the control of outdoor advertising.

In general, the act seeks to eliminate outdoor advertising displays within 660 feet of the edge of any interstate or federal primary system highway. Toward this end, the act mandates a 10 percent cut in federal-aid highway funds to any state which fails to provide for "effective control" over the erection and maintenance of such displays. (23 U.S.C. § 131(b).)

Title 23 United States Code section 131(c) explains that "effective control" means that, with five specified content-based exceptions none of which apply in this case, all such displays shall be banned.[2]

The act clearly contemplates that the states will achieve compliance through their inherent powers of zoning and condemnation. (23 U.S.C. § 131(d)–(g).) The act also provides that, at the states' option, advertising displays may be permitted within 660 feet of inter-

[2] The act limits the content of such devices to five acceptable categories. Loosely defined, they are: (1) signs advertising scenic attractions, (2) signs advertising sale or lease of property upon which displays are located, (3) signs advertising activities conducted on the property on which displays are located, (4) landmark signs, and (5) signs advertising the distribution of free coffee to travelers. The signs in category 1 are to conform to standards regulating size, spacing, etc. "to be promulgated by the Secretary." (23 U.S.C. § 131(c).)

At the time of the enactment of the Highway Beautification Act in 1965, "the Secretary" was the Secretary of Commerce; in 1966 Congress created the Department of Transportation and all powers and duties under this act were transferred to the Secretary of Transportation (Pub. L. No. 89-670 (Oct. 15, 1966) 80 Stat. 931.)

state and federal highways within areas zoned industrial or commercial under state law. (23 U.S.C. § 131(d).)

California complies with the Highway Beautification Act through its Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.). This act explicitly recognizes that outdoor advertising is a legitimate commercial use of property adjacent to roads and highways and provides that such advertising "should be allowed to exist in business areas." (*Id.*, § 5226.) The act also provides, however, that it is the policy of the state "to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively . . . ." (*Ibid.*)

The act then provides for restrictions upon outdoor advertising consonant with the provisions of the Highway Beautification Act. For example, outdoor advertisers must obtain permits before placing displays within 660 feet of the right-of-way of interstate and primary highways. (Bus. & Prof. Code, § 5350.) The content of allowable displays within this area is limited to the same categories as specified by the Highway Beautification Act. (*Id.*, § 5405.) Finally, certain safety measures involving size, spacing, and location are imposed. (*Id.*, §§ 5403, 5405, 5408.)

The Department contends that it may enforce the provisions of the Outdoor Advertising Act on Indian reservations because Congress expressly delegated such

enforcement authority to the states through the Highway Beautification Act. Naegele and the Band, on the other hand, argue that this is a misinterpretation of the federal law.

Subdivision (h) of the federal act provides: "All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary." According to the Department, this provision clearly expresses Congress's intention to include Indian reservations under the provisions of the Highway Beautification Act and to give states the authority to enforce the act's provisions on Indian reservations.

Naegele and the Band argue that the phrase "public lands or reservations of the United States" was not intentended to include Indian reservations. They find support for this view in the opinion of the Interior Board of Indian Appeals. (Admin. Appeal, supra, 86 Interior Dec. 680.) The board examined the statute, concluded that it was ambiguous, and interpreted its ambiguities in favor of the Indians. On this basis it concluded that Congress did not intend the Highway Beautification Act to apply to Indian reservations.

The board's interpretation of the Highway Beautfication Act is debatable (United States v. Portneuf-Marsh Valley Irr. Co. (E.D. Idaho 1913) 205 Fed. 416, 419, affd. (9th Cir. 1914) 213 F. 601, 603) but we need not resolve that debate here. Even assuming that the act was in-

tended to apply to Indian reservations, it does not follow that Congress has authorized *state enforcement* of the act on such reservations, or indeed on any federal lands.

Several years before the enactment of the Highway Beautification Act, Congress made an earlier attempt to regulate outdoor advertising adjacent to federally funded highways. In 1958, Public Law No. 85-767 (72 Stats. 885, former 23 U.S.C. § 131) established standards similar to those of the later act and similarly relied upon the states for enforcement. This legislation provided that states which agreed to comply with federal outdoor advertising standards would be entitled to a one-half of 1 percent bonus in federal highway funding. The section of this law applicable to federal lands read: "Whenever any portion of the Interstate System is located upon or adjacent to any public lands or reservations of the United States, *the Secretary of Commerce may make such arrangements and enter into such agreements with the agency having jurisdiction over such lands or reservations as may be necessary to carry out the national policy . . .* , and any such agency is authorized and directed to cooperate fully with the Secretary of Commerce in this connection." (*Id.*, § 131(d), emphasis added.)

Thus the 1958 law clearly did not grant the states authority to enforce highway beautification provisions on federal lands and reservations. Rather, enforcement authority was reserved to the federal agencies having jurisdiction over such lands.

Desert argues that the fact that Congress did not repeat this language in the 1965 act is a clear indication that it wished to transfer enforcement authority over "public lands and reservations" from the federal agencies "having jurisdiction over such lands and reservations" to the states. We do not find this argument persuasive.

The House Report summarizing the legislative intent of the Highway Beautification Act states "[section h] simply extends to all public lands and reservations of the United States which are adjacent to any portion of the Interstate System or the primary system *the same controls* covering other roads which are subject to this legislation." (1965 U.S. Code Cong. & Admin. News, p. 3717 (89th Cong., 1st Sess.), emphasis added.) This summary description could indicate that Congress intended to maintain the same enforcement mechanism it had developed in the 1958 law. Thus, the act's standards (or "controls") would apply to all public lands and reservations of the United States. But, while the states would enforce these controls on state-owned and on private lands through their zoning and condemnation authority, federal agencies would enforce the controls on federal lands through their independent statutory authority over such lands.

Administrative and judicial interpretations of the Highway Beautification Act support this view. [3] In 1970,

[3] The earliest administrative interpretation of the act of which we are aware is a memorandum opinion from the Associate Solicitor for Indian Affairs to the Commissioner of Indian Affairs, Department of the Interior, dated April 7, 1967. This opinion is consistent with our interpretation. Although the opinion concluded that Indian reservations "are subject to regulation under the [High-

the Secretary of the Interior promulgated regulations for the issuance of permits for outdoor advertising on pubic lands under the jurisdiction of the Bureau of Land Management. (Former 43 C.F.R. 2921.0-6.) [4] These regulations effectively prohibited the issuance of permits for outdoor advertising which would not have complied with the standards of the Highway Beautification Act.

In 1977, the Ninth Circuit upheld these Interior Department regulations against a challenge mounted by an outdoor advertising company in Nevada which asserted, inter alia, that Interior's authority to regulate in this area had been preempted by the Highway Beautification Act. (Ryan Outdoor Advertising, Inc. v. United States (9th Cir. 1977) 559 F.2d 554.) The court noted that Interior's authority to administer the laws dealing with federal lands was both well established and "almost plenary." "The fact that Congress has authorized the [federal] Department of Transportation to *set general standards* on outdoor advertising which apply to public lands as well as to private does not preempt continued regulation of the same public lands by the Secretary of

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way Beautification] [A]ct," it did not address the issue of state authority to enforce the act's provisions on federally owned lands and did not suggest that state enforcement had been authorized by Congress.

[4] These regulations, specifically directed toward the issuance of permits for outdoor advertising, disappeared in a general reorganization and renumbering of the regulations which occurred in 1981. The new regulations, which discuss the leasing of public lands in more general terms, make no specific mention of outdoor advertising. (46 Fed. Reg. 5777 (Jan. 19, 1981) 43 C.F.R. 2920.0-1 et seq.)

the Interior. . . . [¶] There is simply no indication that Congress intended in the Highway Beautification Act the significant alteration of a persuasive, well-established regulatory scheme. . . ." (*Id.*, at p. 556, emphasis added.)

In addition, recent precedents in other contexts establish that congressional authorization of state regulation on federal property will be found only where Congress's mandate is explicit. In a pair of cases, the United States Supreme Court has considered the question whether federal statutes mandating state pollution control legislation have the effect of subjecting federal installations and activities located within the states to state regulation. The court concluded that "[b]ecause of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent that there is 'a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.' " (Hancock v. Train (1976) 426 U.S. 167, 179, fns. omitted; see also EPA v. State Water Resources Control Board (1976) 426 U.S. 200.) These cases suggest that congressional authorization of state regulatory action on reservation land held in trust by the United States for the beneficial use of reservation Indians should require a similarly clear and unambiguous mandate.[5] We dis-

[5] See also State of Washington v. Environmental Protection Agency (9th Cir. Feb. 6, 1985) ___ F.2d ___ (CA No. 83-7763) upholding the EPA's conclusion that the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. section 6901 et seq., "does not

cern no such explicit mandate in the Highway Beautification Act.

Further, as noted above, the Highway Beautification Act contemplates that the states will achieve compliance through the use of their inherent powers of zoning and eminent domain. Yet tribally owned Indian reservation land is not subject to state powers of eminent domain (Minnesota v. United States (1939) 305 U.S. 382; United States v. 10.69 Acres of Land (9th Cir. 1970) 425 F.2d 317), and states are not authorized to enforce their land-use regulations on Indian reservations (Santa Rosa Band of Indians v. Kings County (9th Cir. 1975) 532 F.2d 655, cert. den. (1977) 429 U.S. 1038). Additionally, Indian tribes are immune from suit in the absence of an effective waiver or consent. (Puyallup Tribe v. Washington Game Dept. (1977) 433 U.S. 165, 172.) The Supreme Court has held that, while Congress can authorize suits against Indian Nations, a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. (Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49, 58.) [6]

It appears logically imperative that, had Congress intended the states to enforce the provisions of the High-

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give the state jurisdiction over Indian lands, and that states could possess such jurisdiction only through an express act of Congress or by treaty" even though Indian tribes are clearly regulated entities under RCRA and the act authorizes state regulation in lieu of the federal program.

[6] In *Santa Clara Pueblo*, supra, 436 U.S. 49, the United States Supreme Court held that Congress's action in enacting the Indian Civil Rights Act of 1968 (25 U.S.C. §§ 1301–1303) which, in relevant part, provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws" (§ 1302(8)), could not be interpreted as an implicit waiver of the tribes' immunity from suit. The court concluded that such a waiver requires an "unequivocal expression of . . . legislative intent. . . ." (*Santa Clara Pueblo*, supra, 436 U.S. at p. 59.)

way Beautification Act against nonconforming advertising displays located on Indian tribal lands, it would have empowered the relevant state authorities to condemn reservation lands, to regulate tribal land use, and to sue Indian tribes. No such authorization can be found in the Highway Beautification Act.

We therefore conclude that, even if Congress intended the outdoor advertising standards of the Highway Beautification Act to apply on Indian reservations, it did not intend that these standards be enforced through the assertion of state power. Thus, we reject the Department's argument that the Highway Beautification Act authorizes state regulation of outdoor advertising on Indian reservation lands.

Both the Department and Desert argue alternatively that the act of August 15, 1953 (Pub. L. No. 83-280, 67 Stat. 589 (commonly known as Public Law 280)) confers upon the State of California the authority to enforce its Outdoor Advertising Act on Indian reservation lands. This position is untenable.

Although section 4 of Public Law 280, codified at 28 United States Code section 1360, appears to provide that all state laws of general application are effective on Indian reservations within the specified states,[7] the law

[7] Section 4(a), as codified at 28 United States Code section 1360(a) (1976), provides: "(a) Each of the States . . . listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . : . . . . California . . . . . All Indian country within the State."

has not been so construed by the federal courts. In Bryan v. Itasca County (1976) 426 U.S. 373, the Supreme Court, reasoning that "the primary intent of § 4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court" (*id.*, at p. 385), concluded that Public Law 280 did not give Minnesota the authority to tax the personal property of Indians living on a reservation. More recently, the Ninth Circuit concluded that Public Law 280 does not authorize the enforcement of state and county laws controlling the conduct of bingo games on Indian reservations in California. (Barona Group of Capitan Grande Band, etc. v. Duffy (9th Cir. 1982) 694 F.2d 1185.) The court noted: "The Supreme Court . . . has construed [section 4] to mean that states have jurisdiction *only* over private civil litigation involving reservation Indians in state court. [Citation.] Thus a state may not impose general civil/regulatory laws on the reservation." (*Id.*, at pp. 1187–1188, emphasis added.) Neither Desert nor the Department advances any convincing argument why we should diverge from the *Barona* court's conclusion. We therefore conclude that state enforcement of the Outdoor Advertising Act on Indian reservations is not authorized by Public Law 280.[8]

[8] The Department also appears to argue that the Secretary of the Interior's notice supplementing 25 Code of Federal Regulations section 1.4, published at 30 Federal Register 8722 (July 2, 1965), provides an independent basis for its assertion of state regulatory authority over Indian lands. This notice, however, specifically provides: "Nothing contained in this notice shall be construed to in any way alter or limit the provisions of [Public Law 280]." In light of this proviso, we are satisfied that the Secretary's directive is merely an attempt to interpret the aims of Congress in enacting Public Law 280. As such, it should not be construed to endow the state with broader general regulatory authority over Indian lands than mandated by the congressional enactment.

For these reasons we determine that Congress has not authorized state regulation of outdoor advertising on Indian reservations. This does not end our inquiry, however.

The United States Supreme Court has observed that under certain circumstances a state may validly assert authority over on-reservation activities even in the absence of a congressional mandate to do so. (New Mexico v. Mescalero Apache Tribe (1983) ___ U.S. ___ [103 S.Ct. 2378, 2384–2385].) It may be argued that this is such a case.

The Department cites Rice v. Rehner (1983) 103 S.Ct. 3291, Puyallup Tribe v. Washington Game Dept. (1977) 433 U.S. 165, and Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145, among others, as examples of cases in which state regulation of Indian activities has been found permissible. But these cases are inapposite.

In Rice v. Rehner, the court found that Congress had expressly provided for the application of state law. (*Rice*, supra, 103 S.Ct. 3291, 3302.) In Mescalero Apache Tribe v. Jones and Puyallup Tribe v. Washington Game Dept., the court scrutinized pertinent federal law and discerned no intent to preempt state authority. The situation is quite different here.

More than 10 years ago, the Supreme Court noted that, in the area of state regulation of tribal enterprises, generalizations have become treacherous. Nonetheless, amid the welter of decisions analyzing preemption in

this unique context, the Supreme Court has recently reaffirmed that "a State will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption . . . ." (*New Mexico*, supra, 103 S.Ct. at p. 2386.)

Among these "familiar principles" is the following. Whether federal legislation preempts state law "is a matter of legislative intent. In ascertaining this intent, . . . the test . . . is whether the enforcement of state law would conflict with the purposes of the federal legislation, whether by frustrating an affirmative federal purpose or by interfering with a matter intentionally left unregulated by Congress." (Loma Portal Civic Club v. American Airlines, Inc. (1964) 61 Cal.2d 582, 591.)

The Highway Beautification Act clearly represents Congress's intent to design a comprehensive scheme for the regulation of outdoor advertising adjacent to federal highways throughout the United States. In Interior's view, Congress intended to leave Indian reservation lands entirely unregulated under the act. In our opinion, Congress may have intended the act's provisions to apply on Indian reservations. But if so, it reserved to federal authorities the responsibility for enforcing the act's provisions upon federal lands and reservations. In either case, the assertion of state regulatory authority in this area would clearly conflict with Congress's purposes, either by subjecting Indian enterprises exempt from control under the federal act to state regulation, or by imposing inconsistent state regulations in an area reserved for federal oversight. [9]

[9] Interior's authority to supervise the enterprise at issue here cannot be doubted. Under 25 United States Code section 415(a) Indian

For this reason, we conclude that the state's regulatory authority in this area is preempted by the operation of federal law and the judgment in favor of the Department must be reversed. [10]

Desert's judgment on the complaint of unfair competition must also be reversed. [11] This action is premised upon the language of Business and Professions Code section 17200 which defines "unfair competition" to include any "unlawful" business practice. Desert admits that if Naegele's conduct is not forbidden by law, there is no unfair competition. We have concluded that California law cannot be applied to regulate the billboards at issue. And, even if Naegele's conduct could somehow be construed as violative of federal law, state court injunctive relief under the theory of unfair competition is inappropriate.

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lands may be leased for business purposes only "with the approval of the Secretary of the Interior." In accordance with this statutory authorization, the Secretary has issued extensive regulations pertinent to the leasing of Indian lands. (25 C.F.R. § 162 et seq.)

The record amply indicates that the Band's outdoor advertising enterprise has been encouraged and approved by the Bureau of Indian Affairs. By contrast the Department has presented evidence that every one of the 16 advertising displays involved here is in violation of substantive provisions of state law.

[10] With all due respect to our concurring colleague, we see little resemblance between this case and In re Wilson (1981) 30 Cal.3d 21, except for the fact that both involve Indians. The question in *Wilson* was "whether extinguishment of the [Pit River] tribe's Indian title to, or right to occupy, their aboriginal territory operated to extinguish the tribe's aboriginal hunting rights." (*Id.*, at p. 24.) No issue pertaining to regulation of activity on reservations, or of federal preemption, was involved.

[11] Desert initially filed a cross-appeal as to its three other causes of action. This cross-appeal was dismissed at Desert's request on March 8, 1983.

A similar question was raised in Diaz v. Kay-Dix Ranch (1970) 9 Cal.App.3d 588. In that case, plaintiff migratory farmworkers sought an injunction prohibiting defendant ranch owners from knowingly employing illegal aliens. An action alleging unfair competition was brought under former Civil Code section 3369.

The court, while recognizing the farmworkers' need for protection, denied injunctive relief on the basis that federal action through the authority of the Immigration and Naturalization Service would be more efficacious than injunctive relief. "Plaintiffs seek the aid of equity because the national government has breached the commitment implied by national . . . policy. It is more orderly, more effectual, less burdensome to the affected interests, that the national government redeem its commitment. Thus the court of equity withholds its aid." (*Diaz,* supra, at p. 599.)

As discussed above, it is unclear whether the provisions of the Highway Beautification Act were intended to apply to outdoor advertising on Indian reservations at all. Even if this question were resolved in Desert's favor, however, we have concluded that Interior, rather than the Department, is the appropriate agency to enforce the act's provisions. The sound counsel of the *Diaz* decision, therefore, mandates state abstention in reliance upon federal enforcement in this case.

The summary judgments are reversed. [12]

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[12] Because we base our conclusion on grounds of federal preemption, we need not resolve the issue whether, as Naegele asserts, the lawsuits against it should be dismissed pursuant to Code of Civil Procedure section 389 on the basis that the Band is a necessary party which cannot be joined.

GRODIN, J.

WE CONCUR:
BIRD, C.J.
KAUS, J.
BROUSSARD, J.
REYNOSO, J.
LUCAS, J.

C O P Y

PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.

L.A. 31911

CONCURRING OPINION BY MOSK, J.

I concur in the majority opinion.

In doing so, however, I wonder about the appearance of consistency when the court defers to *federal* control of Indian lands in a case involving billboards, after holding that traditional Indian hunting and fishing rights must yield to *state* control in a case involving fish and game laws. (In re Wilson (1981) 30 Cal.3d 21; but see dis. opn. by Mosk J. and Newman, J., at p. 37 ff.)

To offer a more convincing rationale in the instant matter, and to provide a recognizable pattern in the law, we should take this opportunity to overrule *Wilson*.

MOSK, J.

PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., etc.

L.A. 31911

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TRIAL COURT & NO.:	Riverside County Superior Court Nos. 126069, 137500
TRIAL JUDGE:	Honorable J. William Mortland

APPENDIX B

ORDER DENYING REHEARING

L.A. No. 31911

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION

V.

NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.

DESERT OUTDOOR ADVERTISING, INC.

V.

NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.

OPINION MODIFIED.

Respondent's petition for rehearing DENIED.

Broussard
Acting Chief Justice

COPY

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION, *Plaintiff and Respondent,* v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., *Defendant and Appellant.*	L.A. 31911 (Super.Ct.No. 126069)
DESERT OUTDOOR ADVERTISING, INC., *Plaintiff and Respondent,* v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., *Defendant and Appellant.*	(Super.Ct.No. 137500

MODIFICATION OF OPINION

BY THE COURT:

The opinion herein, appearing at 38 Cal.3d 509, is modified as follows:

1. On page 513, delete the words "and Desert Outdoor Advertising, Inc. (Desert)" after the words "[i]n 1977 the Band solicited proposals for further leases from several . . . firms including Naegele . . . ."

2. On page 517, the cite to *Portneuf-Marsh* should begin: "see . . ." so that the sentence will now read: "The board's interpretation of the Highway Beautification Act is debatable (see United States v. Portneuf-Marsh Valley Irr. Co. (E.D. Idaho 1913) 205 Fed. 416 419, affd. (9th Cir. 1914) 213 F. 601, 603), but we need not resolve that debate here."

3. On page 522, add the following: "See also People v. McCovey (1984) 36 Cal.3d 517, 525" to be inserted after the following language so that it now reads: "Nonetheless, amid the welter of decisions analyzing preemption in this unique context, the Supreme Court has recently reaffirmed that 'a State will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption. . . .' (*New Mexico, supra,* 462 U.S. at pp. 333–334. See also People v. McCovey (1984) 36 Cal.3d 517, 525.)"

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

REMITTITUR

LA No. 31911

THE PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION,
DESERT OUTDOOR ADVERTISING, INC.,
Plaintiffs and Respondents,
vs.
NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.,
Defendant and Appellant.

Appeal
County Riverside
Superior Court
No. 120069
137500

The above-entitled cause having been heretofore fully argued, and submitted,

IT IS ORDERED, ADJUDGED, AND DECREED *by the Court that the summary judgments of the Superior Court of the County of Riverside in the above-entitled cause, are hereby reversed. Appellants shall recover costs on appeal.*

I, LAURENCE P. GILL, *Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing*

is a true copy of an original judgment entered in the above-entitled cause on the 2nd day of May, 1985.

WITNESS *my hand and the seal of the Court, this 11th day of July, 1985.*

LAURENCE P. GILL
Clerk

By D. McHENRY
Deputy

APPENDIX C

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION, *Plaintiff and Respondent,* v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., etc., *Defendant and Appellant.*	4 Civil 27494 (Super.Ct.No. 126069)
DESERT OUTDOOR ADVERTISING, INC., etc., *Plaintiff and Respondent* v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., etc., *Defendant and Appellant.*	4 Civil 27937 (Sup.Ct.No. 137500)

OPINION

APPEAL from the Superior Court of Riverside County. J. William Mortland, Judge. Affirmed.

Best, Best & Krieger, Barton C. Gaut, Ronald J. Kohut and Richard Cross for Appellant Naegele Outdoor Advertising Company of California.

Art Bunce as Amicus Curiae of the Morongo Band of Mission Indians on behalf of Appellant.

Robert F. Carlson, Chief Counsel, Gordon S. Baca, Deputy Chief Counsel, William M. McMillan and Ruby A. Theophile, for Respondent People ex rel. Department of Transportation.

Maxwell, Wright & Wheeler and Sprague Wheeler for Respondent Desert Outdoor Advertising, Inc.

This consolidated appeal stems from two separate judgments entered after the trial court granted each plaintiff's motion for summary judgment. Both cases, tried separately below, raise substantially the same issues and involve the same defendant. Because a resolution of these issues will have a significant effect on the Morongo Band of Mission Indians, we granted its request to file a brief amicus curiae.

I

The Morongo Band of Mission Indians (Band) is a federally-recognized Indian tribe, and is the beneficial owner of the Morongo Indian Reservation, consisting of approximately 32,300 acres of land located in Riverside County, California. The Morongo Indian Reservation was created by a series of seven executive orders of various Presidents of the United States, one presidential proclamation, one federal statute, and one deed, beginning in 1876 and ending in 1948. Under Patent Number

172786, the United States declared it will hold the said tracts of land ". . . in trust for the sole use and benefit of the said Morongo Band or Village of Indians, according to the laws of California. . . ."

The reservation lies astride a narrow pass between the San Bernardino and San Jacinto Mountain Ranges. As a result only a small portion of the land is located on the plain suitable for economic development. These relatively few acres lie adjacent to Interstate Highway 10, connecting Los Angeles to popular Southern California desert communities. Upon determining that the highest and best use of this land was outdoor billboard advertising, the Band's general membership delegated to its Tribal Council authority to negotiate agreements for an outdoor advertising business.

According to the brief of Amicus Curiae, the Band leased some of this reservation land to non-Indian firms who operated billboards there until 1977. In 1977 the Band solicited proposals for further leases from several non-Indian firms including Naegele Outdoor Advertising Company of California, Inc. (Naegele) and Desert Outdoor Advertising, Inc. (Desert). Naegele's bid was selected and a lease agreement followed.

Pursuant to title 25 of the United States Code, the Department of the Interior must approve such leases before they become effective. (25 U.S.C., § 415.) Upon submission, approval was denied because the designed purpose, in the department's opinion, would violate the Highway Beautification Act (23 USC, § 131 et seq.) and California's Outdoor Advertising Act (Bus. & Prof.

Code, § 5200 et seq.). Appeal was taken to the Interior Board of Indian Appeals, which resulted in the Interior Department's reversing its opinion concerning the applicability of the Highway Beautification Act. (*Administrative Appeal of the Morongo Band of Mission Indians* v. *Area Director, Sacramento Area Office* (1979) 86 I.D. 680.)

During the pendency of the Interior appeal, on March 30, 1978, the Band entered into an agency [1] agreement with Naegele. It provided for the installation, construction, operation and maintenance of 15 outdoor advertising structures located on reservation land. On June 27, 1978, the Department of Transportation (department) notified Naegele of its intention to apply and enforce California's Outdoor Advertising Act. In its brief the department expresses its philosophy of enforcement: "to control outdoor advertising consistent with state and federal law concern with environmental and aesthetic and safety purposes."

Despite the department's warning and implication that the displays would violate the Outdoor Advertising Act, 16 billboards were erected on reservation land. The state outdoor advertising inspector ultimately issued citations for all 16 displays.

On July 10, 1978, the People of the State of California, acting by and through the Department of Transportation filed a complaint and motion for preliminary and

[1] We take judicial notice of the fact that this agency agreement was approved on or about February 2, 1984, by the Bureau of Indian Affairs.

permanent injunction against Naegele. The complaint alleged Naegele was in control of 16 outdoor advertising structures located adjacent to Interstate Route 10 in Riverside County. These structures were in violation of section 5350 of the Business and Professions Code, requiring display permits. Additionally these displays have been illegally situated in violation of various provisions of the Outdoor Advertising Act. The department identified these displays as a public nuisance within the meaning of Business and Professions Code section 5461.

The preliminary injunction was granted on August 1, 1978. And, on November 6, 1981, in accordance with the department's motion, summary judgment resulted.

The action consolidated with that of the Department of Transportation's was initially filed by Desert on June 26, 1980. In its first amended complaint of December 12, 1980, Desert alleged causes of action for nuisance, unfair competition, intentional interference with prospective economic benefit and negligent interference with prospective economic benefit. Naegele's demurrer was sustained as to the nuisance cause of action. The court dismissed both causes of actions for interference and granted Desert's motion for summary judgment on the unfair competition cause of action. In its order the court enjoined Naegele from maintaining advertising structures on the reservation without complying with the Outdoor Advertising Act. Naegele was ordered to remove all non-complying structures. The enforcement of this judgment was stayed pending appeal to this court.

II

The Highway Beautification Act contains a particular section dedicated to the control of outdoor advertising. (23 U.S.C., § 131.) Congress has exhibited an intention of controlling outdoor advertising devices adjacent to the interstate highway system "in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." (23 U.S.C., § 131, subd. (a).)

Congress has limited the content of outdoor advertising devices located adjacent to interstate highways. Five acceptable categories have been identified. Loosely defined, they are: (1) Scenic attractions; (2) sale or lease of property; (3) activities conducted on the property on which displays are located; (4) landmarks; and (5) offers of free coffee to travelers. (23 U.S.C., § 131, subd. (c).) The implementation of these limits has been left to the individual states by way of an incentive/punishment system concerning federal-aid highway funds. In 23 United States Code section 131, subdivision (b), Congress provides a state's allotment of federal highway funds shall be reduced by 10 percent for failure to implement "effective control" over outdoor advertising devices. "Effective control" is then defined in the following subdivision to mean the five limits as described above.

California complies with the Highway Beautification Act by its Outdoor Advertising Act, Business and Professions Code section 5200 et seq. The Outdoor Advertising Act's policy behind highway advertising display regulation is "to promote the public safety, health, welfare,

convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively. . . ." (Bus. & Prof. Code, § 5226.)

Although outdoor advertising is recognized as a legitimate commercial use of property adjacent to highways (*id.*), several restrictions are imposed. First the advertiser must secure a permit prior to displaying the ad. (Bus. & Prof. Code, § 5350.) The code then limits the content of the displays to "(1) [d]irectional or other official signs or notices that are required or authorized by law, including, but not limited to, signs pertaining to natural wonders, scenic and historical attractions . . . (2) . . . advertising the sale or lease of the property upon which [the displays] are located . . . (3) [those] which advertise the business conducted or services rendered or the goods produced or sold upon the property upon which the advertising display is placed. . . . (4) [m]essage center displays, provided they advertise the business conducted or services rendered or goods produced or sold upon the property upon which the display is placed. . . . (5) [those] erected or maintained pursuant to regulations of the director, and not inconsistent with the national policy set forth in subdivision (f) [2] of Section 131 of Title 23 of the United States Code

[2] 23 United States Code section 131, subdivision (f), provides: "The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System, on which signs, displays,

and the standards promulgated thereunder by the Secretary of Transportation, and designed to give information in the specific interest of the traveling public." (Bus. & Prof. Code, § 5405.) Finally certain safety measures involving size, spacing and location are imposed. (Bus. & Prof. Code, §§ 5403, 5404, and 5408.)

III

The lower court in both cases concluded the Outdoor Advertising Act was applicable in its summary judgment rulings. This appeal therefore raises the issue of whether the Outdoor Advertising Act applies to a non-Indian company acting pursuant to an agency agreement providing for the construction and maintenance of advertising display devices on reservation land held in trust by the United States for the beneficial use of the Morongo Band Mission Indians.

IV

The applicability of a statute is unquestionably an issue of law. (*Killian* v. *City and County of San Francisco* (1978) 77 Cal.App.3d 1, 7; 6 Witkin, Cal. Procedure (2d ed.) §§ 209–210, pp. 4200–4201.) As such the trial court properly resolved this question by way of summary

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and devices giving specific information in the interest of the traveling public may be erected and maintained. The Secretary may also, in consultation with the States, provide within the rights-of-way of the primary system for areas in which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary."

judgment. Where there is no material issue of fact to be tried and the sole question remaining is one of law, it is the duty of the court to determine the issue of law. (*Angelus Chevrolet* v. *State of California* (1981) 115 Cal.App.3d 995, 1000; *Zahn* v. *Canadian Indem. Co.* (1976) 57 Cal.App.3d 509, 512; *Vincent* v. *State of California* (1971) 22 Cal.App.3d 566, 570.) As indicated below, the Outdoor Advertising Act's applicability hinges on a federal pre-emption approach. To complicate matters, that approach, as it applies to Indians, calls for a balancing of interests. Nevertheless, the main issue here is the applicability of a statute, which is a question of law—properly determined by the lower court.

V

A review of American history reveals the inconsistency with which the Indians have been treated. As the American pioneers forged westward, they in turn pushed the Indians into unexplored lands where they were free to govern themselves. However, continued American westward movement made it evident that the Indians could not be isolated forever. "[T]he United States [therefore] began to consider the Indians less as foreign nations and more as a part of our country." (*Organized Village of Kake* v. *Egan* (1962) 369 U.S. 60, 72 [7 L.Ed.2d 573, 581; 82 S.Ct. 562].) Nevertheless, the Supreme Court committed the United States to a policy of leaving the Indians free from state jurisdiction. The Indian nations were "distinct political communities, having territorial boundaries, within which their author-

ity is exclusive, and having a right to all the lands within those boundaries which is not only acknowledged but guaranteed by the United States." (*Worcester* v. *The State of Georgia* (1832) 6 Pet. 515, 557 [8 L.Ed. 483, 499] overruled on other grounds in *Mescalero Apache Tribe* v. *Jones* (1973) 411 U.S. 145 [36 L.Ed.2d 114; 93 S.Ct. 1267].)

Worcester indicated the United States intended to deal with the Indians as sovereigns, however, since that time the Indian sovereignty doctrine has "undergone considerable evolution in response to changed circumstances." (*McClanahan* v. *Arizona Tax Commission* (1973) 411 U.S. 164, 171 [36 L.Ed.2d 129, 135; 93 S.Ct. 1257] overruled on other grounds in *Bryan* v. *Itasca County* (1976) 426 U.S. 373 [48 L.Ed.2d 710; 96 S.Ct. 2102.) For example where Indians have left the reservation, state laws have been held applicable to such individuals. (*Oklahoma Tax Com.* v. *United States* (1943) 319 U.S. 598 [87 L.Ed. 1612; 63 S.Ct. 1284].) And, under certain circumstances, a state may validly assert authority over the affairs of non-Indians on a reservation. (*Washington* v. *Confederate Tribes* (1980) 447 U.S. 134 [65 L.Ed.2d 10; 100 S.Ct. 2069].) The continuing development of this doctrine proves "the relation of the Indian Tribes living within the borders of the United States . . . is an anomolous one and of a complex character. . . ." (*United States* v. *Kagema* (1886) 118 U.S. 375, 381 [30 L.Ed. 228, 230; 6 S.Ct. 1109].)

The recent Supreme Court trend, at least insofar as the applicability of state laws to Indians is concerned,

has been away from the idea of inherent Indian sovereignty and toward reliance on federal pre-emption. (*Rice* v. *Rehner* (July 1, 1983) 51 U.S.L.Week 5141, 5142.) "The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." (*McClanahan* v. *Arizona Tax Commission, supra,* 411 U.S. 169, 172.)

The question of whether federal law pre-empts the state's exercise of its regulatory authority is not answered by a traditional pre-emption approach. (*Ramah Navajo Sch. Bd.* v. *Bureau of Revenue* (1982) 458 U.S. 832 [73 L.Ed.2d 1174, 1180; 102 S.Ct. 3394].) Indian sovereignty, as it has developed now manifests itself in this pre-emption analysis in such a way to "provide a backdrop against which the applicable treaties and federal statutes must be read." (*McClanahan, supra,* 411 U.S. at 172; *Rice, supra,* 51 U.S.L.Week at 5142.) The Supreme Court has articulated this unique pre-emption approach in a variety of ways. "Individualized treatment [is now given to] particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians and the Federal Government." (*Mescalero Apache Tribe* v. *Jones* (1973) 411 U.S. 145, 148 [36 L.Ed.2d 114, 119; 93 S.Ct. 1267].) State law may unlawfully "infringe on the right of reservation Indians to make their own laws and be ruled by them." (*Williams* v. *Lee* (1959) 358 U.S. 217, 220 [3 L.Ed.2d 251, 254; 79 S.Ct. 269].) "The tradition of Indian sovereignty over the reservation and

tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." (*White Mountain Apache Tribe* v. *Bracker* (1980) 448 U.S. 136, 143 [65 L.Ed.2d 665, 672; 100 S.Ct. 2578].) Pre-emption "calls for a particularized inquiry into the nature of the state, federal and tribal interests at stake. . . . State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law unless the state interests at stake are sufficient to justify assertion of state authority." (*New Mexico* v. *Mescalero Apache Tribe* (June 13, 1983) 52 U.S.L.Week 4741, 4743-4744.) "The role of tribal sovereignty in pre-emption analysis varies in accordance with the particular 'notions of sovereignty that have developed from historical traditions of tribal independence.' [Citation.] These traditions themselves reflect the 'accommodation between the interests of the tribes and the federal government, on the one hand, and those of the state, on the other. [Citation.]" (*Rice, supra,* 51 U.S.L.Week at 5142.)

We read from these cases an ad hoc balancing approach [3] concerning pre-emption of state laws as they affect Indians. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplica-

[3] We are mindful that in applying this balancing approach "[a]mbiguities in the federal law have been construed generously [in the Indian's favor] in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence." (*White Mountain Apache Tribe* v. *Bracker, supra,* 448 U.S. 136, 143–144.)

ble, for the state's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." (*Bracker, supra,* 448 U.S. at 144.) Therefore, Indians retain powerful control and authority to regulate their internal and social relations on the reservation. Congress' goal of encouraging tribal self-sufficiency and economic development presents a nearly insurmountable barrier to the states should they attempt to regulate in these particular areas. (*Mescalara* (sic) *Apache Tribe, supra,* 51 U.S.L.Week at 4743–4744.) However, this is not the case with respect to the Outdoor Advertising Act.

In fact, the general context in which this case comes to us is quite different from nearly all the cases to which we are cited. Primarily in these cases no *particular* federal statute is in issue. Rather the issue is whether a particular state statute can be applied to the Indians in light of the strong federal interest of encouraging Indian self-sufficiency and Congress' control over the Indians. (U.S. Const., art. I, § 8, cl. 13.) For example, in *White Mountain Apache Tribe* v. *Bracker, supra,* 448 U.S. 136, the issue was the applicability of a state license and fuel use tax (not particularly authorized by Congress) to activities of non-Indians engaged in commerce on Indian lands. The court found the state laws pre-empted by applying the balancing approach as discussed above. *Ramah Navajo Sch. Bd.* v. *Bureau of Revenue, supra,* 458 U.S. 832, and *Santa Rosa Band of Indians* v. *Kings County* (9th Cir. 1975) 532 F.2d 655, *cert. den., Kings County* v. *Santa Rosa Band of Indians* (1977) 429 U.S. 1038 [50

L.Ed.2d 748, 97 S.Ct. 121] required the respective courts to determine if certain congressional procedures were so pervasive that they pre-empted the effect of particular state statutes on the Indians. Again, no federal statute was applicable.

Contrast *Leavenworth, etc. R.R. Co.* v. *United States* (1875) 92 U.S. 733 [23 L.Ed. 634], which presents a similar format to the case at bar. In *Leavenworth,* Congress passed a particular statute allowing the states to acquire certain lands to aid in the construction of railroads. The issue before the court was whether the state could properly acquire Indian reserved lands. The statute was in general terms which neither included nor excluded any particular lands. The court concluded that absent an express declaration, the Indian lands were excluded from this statute. (92 U.S. at 741, 744.) Further the Indian lands were expressly excluded from the act's reach: "That any and all lands heretofore reserved to the United States, by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby reserved to the United States from the operation of this Act. . . ." (92 U.S. at 746.)

The instant case involves a federal statute (Highway Beautifiction Act) which authorizes the state to act. Unlike the *Leavenworth* statute, the Highway Beautification Act provides:

"All public lands or *reservations of the United States* which are adjacent to any portion of the Interstate sys-

tem and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary." (23 U.S.C., § 131, subd. (h); emphasis supplied.)

We are thus confronted with the issue of whether, in light of the balancing approach discussed above, section 131, subdivision (h), authorizes the state to reach Indian land. In effect, we are dealing with the flip side of preemption analysis.

Both sides present strong arguments on whether the Highway Beautification Act authorizes states to control Indian lands particularly in light of section 131, subdivision (h). Plaintiffs point out the House Report summarizing the legislative intent of the Highway Beautification Act supports their interpretation that the Outdoor Advertising Act reaches Indian land: "This section simply extends to all public lands and reservations of the United States which are adjacent to any portion of the Interstate System or the primary system the same control, covering other roads which are subject to this legislation." (2 U.S. Code Cong. & Admin. News (1965) 89th Cong., 1st Sess., 3717.)

Regarding this same section, plaintiffs assert the term "reservation" had to include Indian reservation because the House discussed *Indian* Reservations in their debates on this legislation: ". . . A great many tourists who travel through South Dakota like to stop and visit our Sioux Indian Reservations. . . . South Dakota has at least five great Indian Reservations. Some of the highways pass through some of the reservations. . . . Our

fine Indian citizens encourage the people . . . to stop and get acquainted with Indian ways . . . [¶]But there is no way in the world that tourists who desire to take advantage of such opportunities can do so unless it is by signs directing them off a highway to a reservation. . . ." (III Committee Hearing on Floor Debates, Cong. News, part 18, 89th Cong., 1st Sess., at p. 24123.)

Desert also points out the legislators were informed that this country contained some 41,000 miles of Interstate Highway. They also knew the Interstate paralleled Indian land; so by specifying "forty-one thousand miles" in the Act (see 23 U.S.C., § 131, subd. (e) (1)) they must necessarily have intended it to apply to the adjacent Indian land.

Further, plaintiffs cite us to *United States* v. *Portneuf-Marsh Valley R.R. Co.* (1913) 205 F. 416, where at page 419, the court states: "That an Indian reservation is a 'reservation of the United States' admits of little doubt."

Conversely, defendant and amicus curiae argue that the Federal Highway Administration's interpretation of the Highway Beautification Act should be given deference. It concluded the "failure of the Act to delegate either to the Federal Highway Administration, Department of Transportation, or to the Department of the Interior, the explicit authority to implement the act on Indian reservations results in nonapplicability to Indian reservations. . . ."

We are also urged to give deference to the Department of the Interior's interpretation that the Highway Beautification Act does not apply to Indian reservations.

The Interior department stated that "absence of statutory language expressly including or excluding Indian reservations as territory subject to the [Highway Beautification Act] renders the term 'reservations' as used in section 131(h), ambiguous."[4] And "doubtful statutory language must be interpreted in favor of the Indians." (*Administrative Appeal of the Morongo Band of Mission Indians* v. *Area Director, supra,* 86 I.D. 680, 687–688.)

Having thus far set out the standards, the law, and the arguments, we must now apply the balancing approach to determine if the Outdoor Advertising Act has been pre-empted. As stated, this is not a traditional pre-emption analysis because (1) the Outdoor Advertising Act affects Indians and (2) there is a Congressional Act which purportedly authorized state regulation. There is no question that the Outdoor Advertising Act affects the Morongo Indian Tribe. Clearly any regulatory scheme limiting economic pursuits will have an effect. However, outdoor advertising can hardly be deemed a traditional Indian custom affecting tribal relations on the reservation.

More importanty, we find the Highway Beautification Act specifically contemplated and authorized states to regulate outdoor advertising on Indian lands adjacent to Interstate Highways. Congress no doubt intended its Highway Beautification Act policies to be applied over

[4] See also *United States* v. *Celestine* (1909) 215 U.S. 283, 285 [54 L.Ed. 195, 197] for a discussion of inherent problems of interpreting "reservation" always to include Indian country.

all interstate highways. A checkerboard effect would defeat this intent, and such effect is precisely what would result should we find the Outdoor Advertising Act inapplicable in this case. Regarding the displays in this case, we conclude the Outdoor Advertising Act does apply.

Having concluded the Highway Beautification Act authorizes state regulation, we need not and do not reach the issue of whether 28 United States Code section 1360 (Public Law 280) would independently authorize the application of the Outdoor Advertising Act.

VI

Defendant also mounts a procedural attack based on Code of Civil Procedure section 389,[5] joinder of

[5] Code of Civil Procedure section 389, subdivisions (a) and (b) provide:

"(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

"(b) If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's ab-

indispensable party. The argument is made that the Band, as an Indian tribe enjoys immunity from suit. [6] Because the Band is an indispensable party concerning the two actions below, defendant asserts section 389 mandates dismissal.

The failure to join an indispensable party is not a jurisdictional defect mandating dismissal. "[T]he court still has power to render a decision as to the parties before it which will stand." (*Kraus* v. *Willow Park Public Golf Course* (1977) 73 Cal. App.3d 354, 364.) The court must determine whether in "equity and good conscience" the action will proceed. We believe it should and did proceed because there was no pre-emption in this case. "While under some circumstances a state may exercise concurrent jurisdiction over non-Indians acting on tribal reservations, [citations] such authority may be asserted only if not pre-empted by operation of federal law." (*Mescalero Apache Tribe*, *supra*, 51 U.S.L.Week at p. 4743.) In this instance, the state courts must necessarily have the power to enforce state laws. The Band may not hide behind this procedural camouflage in order to escape the Outdoor Advertising Act.

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sence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder."

[6] Indian immunity from the governing arm of the state courts is not a foregone conclusion in every case. As indicated in the recent *Southwest Forest Industries v. Hupa (Hoopa) Timber Corporation* (Jan. 26, 1984, 1 Civ. AO 15598; 84 D.A.R. 526) ___ Cal.App. 3d ___, local tribunals in each instance can and will determine if Congress has authorized state court action. In the present case, however, Indian immunity need not be addressed because the Morongo Indian Tribe is not a party.

VII

The judgment as to both actions is affirmed.

CERTIFIED FOR PUBLICATION

Rickles
J.

We concur:

Kaufman
Acting P. J.

McDaniel
J.

APPENDIX D

Title 23, United States Code

§131. Control of outdoor advertising.

(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the

amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which

they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial of [sic] commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to

zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

(e) Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.

(f) The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. The Secretary may also, in consultation with the States, provide within the rights-of-way of the primary system for areas in which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary.

(g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

(i) In order to provide information in the specific interest of the traveling public, the State highway departments are authorized to maintain maps and to permit information directories and advertising pamphlets to be made available at safety rest areas. Subject to the approval of the Secretary, a State may also establish information centers at safety rest areas and other travel information systems within the rights-of-way for the purpose of informing the public of places of interest within the State and providing such other information as a State may consider desirable. The Federal share of the

cost of establishing such an information center or travel information system shall be that which is provided in section 120 for a highway project on that Federal-aid system to be served by such center or system.

(j) Any State highway department which has, under this section as in effect on June 30, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System shall be entitled to receive the bonus payments as set forth in the agreement, but no such State highway department shall be entitled to such payments unless the State maintains the control required under such agreement: *Provided,* That permission by a State to erect and maintain information displays which may be changed at reasonable intervals by electronic process or remote control and which provide public service information or advertise activities conducted on the property on which they are located shall not be considered a breach of such agreement or the control required thereunder. Such payments shall be paid only from appropriations made to carry out this section. The provisions of this subsection shall not be construed to exempt any State from controlling outdoor advertising as otherwise provided in this section.

(k) Subject to compliance with subsection (g) of this section for the payment of just compensation, nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway sys-

tems than those established under this section.

(*l*) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136, the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254. If any part of an apportionment to a State

is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

(m) There is authorized to be appropriated to carry out the provisions of this section, out of any money in the Treasury not otherwise appropriated, not to exceed $20,000,000 for the fiscal year ending June 30, 1966, not to exceed $20,000,000 for the fiscal year ending June 30, 1967, not to exceed $2,000,000 for the fiscal year ending June 30, 1970, not to exceed $27,000,000 for the fiscal year ending June 30, 1971, not to exceed $20,500,000 for the fiscal year ending June 3, 1972, and not to exceed $50,000,000 for the fiscal year ending June 30, 1973. The provisions of this chapter relating to the obligation, period of availability and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this section after June 30, 1967.

(n) No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment.

(*o*) The Secretary may approve the request of a State to permit retention in specific areas defined by such State of directional signs, displays, and devices lawfully erected under State law in force at the time of their erection which do not conform to the requirements of subsection (c), where such signs, displays, and devices are on [sic] existence on the date of enactment of this subsection and where the State demonstrates that such signs, displays, and devices (1) provide directional information about goods and services in the interest of the traveling public, and (2) are such that removal would work a substantial economic hardship in such defined area.

(p) In the case of any sign, display, or device required to be removed under this section prior to the date of enactment of the Federal-Aid Highway Act of 1974, which sign, display, or device was after its removal lawfully relocated and which as a result of the amendments made to this section by such Act is required to be removed, the United States shall pay 100 per centum of the just compensation for such removal (including all relocation costs).

(q) (1) During the implementation of State laws enacted to comply with this section, the Secretary shall encourage and assist the States to develop sign controls and programs which will assure that necessary directional information about facilities providing goods and services in the interest of the traveling public will continue to be available to motorists. To this end the Secretary shall restudy and revise as appropriate existing

standards for directional signs authorized under subsections 131(c)(1) and 131(f) to develop signs which are functional and esthetically compatible with their surroundings. He shall employ the resources of other Federal departments and agencies, including the National Endowment for the Arts, and employ maximum participation of private industry in the development of standards and systems of signs developed for those purposes.

(2) Among other things the Secretary shall encourage States to adopt programs to assure that removal of signs providing necessary directional information, which also were providing directional information on June 1, 1972, about facilities in the interest of the traveling public, be deferred until all other nonconforming signs are removed.

APPENDIX E

California Business and Professions Code

§ 5226. Regulation of advertising displays adjacent to interstate or primary highways; declaration of necessity

The regulation of advertising displays adjacent to any interstate highway or primary highway as provided in Section 5405 is hereby declared to be necessary to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively, recognizing that a reasonable freedom to advertise is necessary to attain such objectives. The Legislature finds:

(a) Outdoor advertising is a legitimate commercial use of property adjacent to roads and highways.

(b) Outdoor advertising is an integral part of the business and marketing function, and an established segment of the national economy, and should be allowed to exist in business areas, subject to reasonable controls in the public interest.

Supreme Court, U.S.
FILED
NOV 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-615

In The

Supreme Court of the United States

October Term, 1985

—o—

THE STATE OF CALIFORNIA, acting by and through the Department of Transportation, et al.,

Petitioners,

vs.

NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, etc., et al.,

Respondents.

—o—

On Petition for a Writ of Certiorari to the Supreme Court of California

—o—

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

—o—

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STATEMENT OF THE CASE

The Morongo Band of Mission Indians is a sovereign, federally recognized Indian tribe and beneficial owner of the Morongo Reservation. *See Morongo Band of Mission Indians v. Area Director, Sacramento Office,* 7 Interior Board of Indian Appeals 299, 86 Int. Dec. 680, 681-82 (1979) (Morongo) (Appendix 1 hereto). The reservation, which lies astride a pass between the San Bernardino and San Jacinto Mountain Ranges, was created between 1876 and 1948 by a series of seven executive orders, one presidential proclamation, one federal statute and one deed. Pursuant to the Mission Indian Relief Act of 1891, 26 Stat. 712, the federal government holds the reservation in trust "for the sole use and benefit of the band or village . . . ," to be conveyed at the termination of the trust "free of all charge or incumbrance whatsoever. . . ."

The reservation's few natural resources yield little income. Its economy is depressed and many of its members are unemployed and live in poverty. Of its 32,254 acres, less than one square mile is suitable for economic development. *Morongo, supra,* 86 Int. Dec. at 681. That small area is the strip of land flanking Interstate Highway 10, which crosses the southern portion of the Morongo Reservation and is the major east-west artery for travel to and from metropolitan Southern California. *Id.*

The Band has long derived a major part of its income from outdoor advertising along I-10. *Morongo, supra,* 86 Int. Dec. at 681. In 1963 the Band's general membership delegated to the Morongo Tribal Council authority to negotiate outdoor advertising agreements. In a 1977 appraisal report, the Southern California Appraisal Office

of the Bureau of Indian Affairs (BIA) identified outdoor advertising as "the highest and best use of [the] reservation land along Interstate 10." *Morongo, supra*, 86 Int. Dec. at 681 n. 3.

In 1977 the Band solicited proposals for further outdoor advertising from several outdoor advertising businesses. *People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co.*, 38 Cal.3d 509, 513 (1985) (Naegele). On the basis of the more favorable terms offered by the Naegele Outdoor Advertising Company of California, Inc. (Naegele) the Band negotiated a lease with Naegele. Since 25 U.S.C. § 415 and former 25 C.F.R. §131 (now codified as 25 C.F.R. § 162) required the approval of the Department of Interior for such leases, the Band and Naegele submitted the lease to the local Bureau of Indian Affairs (BIA) office for approval. That office disapproved the lease on the ground that it violated the Federal Highway Beautification Act of 1965 (Pub. L. 89-285, codified as amended at 23 U.S.C. §§ 131, 136 & 319) and the California Outdoor Advertising Act (1970 Cal. Stats., ch. 991 § 2 at 1764, codified as amended at Cal. Bus. & Prof. Code §§ 5200 *et seq.*). On March 14, 1978, the Area Director of the BIA upheld the disapproval. The Band appealed to the Commissioner of Indian Affairs, who did not act on the appeal within the 30 days required by 25 C.F.R. § 2.19(a), and the appeal was automatically referred to the Interior Board of Indian Appeals. *See* 25 C.F.R. § 2.19(b).

On December 13, 1979, the Interior Board of Indian Appeals reversed the decision of the Area Director and remanded the case to the Acting Deputy Commissioner of Indian Affairs, with instructions that the BIA "seek to effectuate a business lease for outdoor advertising between

the Morongo Band and the Naegele Company consistent with this opinion." *Morongo, supra,* 86 Int. Dec. at 692. The Board's action was that of the highest authority within the Department of the Interior and was final for the Department. *Id.*; *see* 43 C.F.R. § 4.1.

Meanwhile, in March of 1978 the Band had enacted a land use ordinance designating the Reservation land along Interstate 10 as suitable for commercial development, and on March 30, 1978, while the Band's appeal of the Area Director's decision was still pending, the Band and Naegele entered into a written agency agreement. Pursuant to the agreement, Naegele installed and began operating 15 outdoor advertising signs on the Morongo Reservation.

Naegele paid the Band $250,000 for the right to operate the signs for 10 years. The Band has used this money for fire protection, improved television reception, development of new tribal enterprises, operation of the Tribal Business Committee, and development of alternative energy sources.

On July 10, 1978, the State of California Department of Transportation ("Department") filed a complaint and motion for preliminary and permanent injunction against Naegele, alleging that Naegele had commenced construction of outdoor advertising signs without first applying to the Department for a permit, that the locations of the signs did not comply with the requirements of the California Outdoor Advertising Act, and that the signs constituted a public nuisance. The complaint contained no mention of the fact that the signs were located on the reservation and owned by the Morongos, nor did it name the Morongo Band as a defendant. However, in declarations filed in support of the preliminary injunction motion the

Department acknowledged that the signs were located on the reservation.

Naegele's motion to quash service, or alternatively, for dismissal for failure to join an indispensable party, was denied on August 1, 1978. On October 26, 1981, the State filed a motion for summary judgment, and on November 24 the Riverside Superior Court entered its judgment granting the State's motion for summary judgment and (1) restraining Naegele from placing or maintaining outdoor advertising structures on the Morongo reservation and (2) ordering Naegele to dismantle and remove each advertising structure on the Reservation. The Court stayed its judgment pending appeal. Naegele appealed.

The Fourth District Court of Appeal, Division Two, consolidated the State's action with the parallel action by Desert Outdoor Advertising, Inc.[1] Because resolution of the issues being appealed would significantly affect the Morongo Band, the Court granted the Band's application for leave to file a brief *amicus curiae*.

On February 3, 1984, after all briefs had been filed and oral argument heard, Naegele filed a motion for judicial notice, by which it apprised the appellate court that on February 2, 1984, the Acting Superintendent of the Southern California Agency of the BIA had approved the Morongo-Naegele agreement, retroactive to the date of its execution on March 30, 1978. (See Appendices 2 & 3 hereto.) Undeterred, the appellate court affirmed the trial court's granting of summary judgment in both actions. Naegele filed its petition for hearing with the California

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[1] *Desert Outdoor Advertising, Inc. v. Naegele Outdoor Advertising Company of California, et al.*, No. 4 Civ. 27937.

Supreme Court on April 9, 1984. The State and Desert filed answering briefs, and the Supreme Court again allowed the Morongo Band to file an *amicus curiae* brief.

On May 2, 1985, the California Supreme Court issued its opinion in the consolidated State and Desert actions. It held (1) that whether or not Congress intended the outdoor advertising standards of the Highway Beautification Act to apply on Indian reservations, it did not intend that these standards be enforced through the assertion of state power; (2) that the Act of August 15, 1953 (Pub. L. 83-280, 67 Stat. 589 (codified at 28 U.S.C. § 1360) (Public Law 280) did not constitute a grant by Congress to California of authority to regulate outdoor advertising on Indian reservations; and (3) that California's Outdoor Advertising Act was further preempted because Congress had, by the HBA, reserved to federal authorities responsibility for enforcing the Act on federal lands and reservations, or, alternatively, because the assertion by California of its outdoor advertising laws would impose inconsistent state regulations in an area reserved for federal oversight. *Naegele, supra*, 38 Cal. 3d at 514-23.[2]

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[2] On August 3, 1984, the Ninth Circuit Court of Appeals issued its opinion in *United States ex rel. Buxbom v. Naegele Outdoor Advertising Company of California, Inc.*, 739 F.2d 473 (9th Cir. 1984), *cert. denied*, 83 L.Ed.2d 779, 105 S.Ct. 795, 53 L.S.L.W. 3484 (1985), reversing the decision below and remanding with directions to dismiss the relator's action. In *Buxbom*, Seymour Buxbom, the president of Desert Outdoor, had alleged (by a complaint filed on December 3, 1982 in the Central District of California) that the March 30, 1978 Morongo-Naegele agency agreement violated 25 U.S.C. § 81. In reversing the district court's grant of summary judgment in favor of Buxbom, the Ninth Circuit held that the BIA had authority to approve the agency agreement retroactively and that such approval precluded any judgment that the agreement between the Band and Naegele was void.

Because it had based its ruling on grounds of federal preemption, the Court expressly refrained from deciding the additional defense asserted by Naegele, to wit, that the lawsuits against Naegele should be dismissed pursuant to California Code of Civil Procedure Section 389 because the Morongo Band was a necessary party that could not be joined. *Id.* at 523 n. 12.

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ARGUMENT

1. Summary of Opposition

The State Department of Transportation's extremely brief petition is devoted to the single contention that the court below improperly failed to conduct the kind of balancing preemption test to which this Court has resorted in cases such as *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 342, 76 L.Ed.2d 611, 103 S.Ct. 2378 (1983). Though the Department seems not to realize it, this argument necessarily rests on the premise that the Court below mistakenly relied on "familiar principles of pre-emption" *(Naegele, supra,* 38 Cal.3d at 522) in holding that the HBA preempted California's right (if any) to regulate on-reservation outdoor advertising.

The upshot is that the Department attacks only the third ground of the decision below, and leaves untouched the first two grounds, i.e., (1) that the HBA did not delegate authority to regulate outdoor advertising on Indian reservations and (2) that Public Law 280 did not confer such regulatory jurisdiction upon California. Thus, the Department has failed to show why the balancing preemption test should have been used rather than the more tradi-

tional preemption test used by the California Supreme Court. The Department's petition should be rejected, therefore, if only because it fails to show why the State Supreme Court was *required* to conduct the kind of specialized balancing test used in *Mescalero, supra.*

Even assuming for the sake of argument, however, that the State Supreme Court incorrectly concluded that the HBA preempted California's jurisdiction "under familiar principles of preemption," the fact remains that the Department's contention that the *Mescalero* preemption balancing test favors its position, rather than Naegele's, is wrong. The Band's and the federal government's interests decisively outweigh those of the Department.

Finally, the fact remains that the Morongo Band is and always has been an indispensable party to this action. To permit the Department to invade sovereign tribal rights by the ruse of an action against Naegele, instead of the Band, violates due process and established principles of tribal sovereignty.

2. The California Supreme Court Correctly Held That The HBA Preempted State Regulatory Jurisdiction Over On-Reservation Outdoor Advertising.

As the California Supreme Court noted in *Naegele*, this Court reaffirmed in *New Mexico v. Mescalero Apache Tribe, supra,* 462 U.S. 324, 339-43, that "'a State will certainly be without jurisdiction if its authority is pre-empted under *familiar principles* of pre-emption. . . .'" *Naegele, supra,* 38 Cal. 3d at 522 (emphasis added). The HBA, the California Court observed, "clearly represent[ed] Congress's intent to design a comprehensive scheme for the regulation of outdoor advertising adjacent to federal high-

ways throughout the United States." *Id.* It did not matter therefore, whether, as the Interior Department had concluded in *Morongo,* Congress intended to leave Indian reservation lands beyond the HBA, or whether it simply reserved to federal authorities the responsibility for enforcing the HBA's provisions upon federal lands and reservations. *Id.* Either way,

> "the assertion of state regulatory authority in this area would clearly conflict with Congress's purposes, . . . by subjecting Indian enterprises exempt from control under the federal act to state regulation, or by imposing inconsistent state regulations in an area reserved for federal oversight." *Id.*

In support of this conclusion, the State Supreme Court emphasized in a footnote that the Interior Department's authority to supervise the enterprise here at issue (outdoor advertising) could not be doubted, citing 25 U.S.C. § 415(a) and 25 C.F.R. § 162, and further noted that the "record amply indicate[d] that the Band's outdoor advertising enterprise [had] been encouraged and approved by the [BIA]." *Naegele, supra,* 38 Cal. 3d at 522 n. 9.

The Department has failed to articulate any reason why this conclusion should be disturbed. The nearest that it comes to broaching the question why a traditional preemption analysis is inadequate appears at page 6, where it briefly considers a token few of the interests which would have to be balanced against the State's in conducting a preemption balancing test. There the Department delivers itself of the following confused and not very helpful observation:

> "Nowhere is there a discussion or consideration of the fact that the [HBA] was designed to stop the prolifer-

> ation of billboards, that states were specifically not prohibited from further restrictions on billboards . . ., nor any indication of how the state's restrictions on billboards would frustrate the intent of Congress to reduce such proliferation." *Id.*

The first clause of the above quotation is probably a mischaracterization of the California Supreme Court's view of the HBA.[3] That, however, is of little consequence, since it and the clauses that follow do not combine to make a point that is either coherent or relevant. As previously discussed, the Department does not dispute the State Supreme Court's conclusion that the HBA did not delegate authority to regulate on-reservation outdoor advertising. We must assume, therefore, that the Department begins from the premise that Congress left the states to deal with the problem themselves, on pain of forfeiting a prescribed percentage of federal revenues. If this is so, it matters not that Congress's purpose may have been to "stop the proliferation of billboards. . . ." Whatever Congress's purpose may have been, it cannot have enlarged the inherent jurisdiction of the states unless there was some delegation of authority. But the Department does not so contend.

Similarly, of what relevance is it that the states were not prohibited from adopting more stringent standards than those requested by the HBA? Is the Department suggesting that greater weight should be given to a putative state interest because Congress did not prohibit the

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[3] *See, e.g. Naegele, supra,* 38 Cal. 3d at 522, where the State Supreme Court observed: "The [HBA] clearly represents Congress's intent to design a comprehensive scheme for the regulation of outdoor advertising adjacent to federal highways throughout the United States."

states from going beyond the minimum standards set forth in the HBA? Again, this cannot be a basis for finding an implied delegation of federal authority over Indian reservations. And in any case, the Department is estopped from claiming that this fact increases the weight of *its* claimed interest—since California's outdoor advertising act does not establish standards more stringent than those of the HBA.

The California Supreme Court's preemption (third) holding is not diminished by any of the Department's arguments.

3. Even If The Preemption Balancing Test Is Used, The Balance Tips Decidedly Against The Department.

The Department contends that California has independent authority to regulate the Morongo signs pursuant to its outdoor advertising act. Analysis of this contention must begin from the established premise that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *New Mexico v. Mescalero Apache Tribe, supra,* 76 L.Ed.2d at 619, *quoting, White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142, 65 L.Ed.2d 665, 100 S.Ct. 2578 (1980). The retained sovereignty of tribes comprises "any aspect of their historical sovereignty 'not inconsistent with the overriding interests of the National Government,'" including in particular "an 'historic immunity from state and local control.'" *New Mexico v. Mescalero Apache Tribe, supra,* 76 L.Ed.2d at 619, *quoting, Washington v. Confederated Tribes,* 447 U.S. 134, 153, 65 L.Ed.2d 10, 100

S.Ct. 2069 (1980) and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 36 L.Ed.2d 114, 93 S.Ct. 1267 (1973). It also includes the power to regulate tribal internal and social relations and the "power to exclude non-members entirely or to condition the presence on the reservation. . . ." *New Mexico v. Mescalero Apache Tribe, supra*, 76 L.Ed.2d at 619. The power to regulate the use of reservation land is a fundamental attribute of the historical sovereignty of Indian tribes. *Id.*, 76 L.Ed.2d at 621, 622; *Cardin v. De La Cruz*, 671 F.2d 363, 365-66 (9th Cir.), *cert. denied*, 459 U.S. 967, 74 L.Ed.2d 277, 103 S.Ct. 293 (1982); *Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900, 903-4 (10th Cir. 1982); *Trans-Canada Enter. v. Muckleshoot, etc.*, 634 F.2d 474, 476-77 (9th Cir. 1980).

The preemption standard that applies to questions of jurisdiction over tribes and Indian lands is a special one. A court must conduct "a particularized inquiry into the nature of the state, federal and tribal interests at stake . . . ." *White Mountain v. Bracker, supra*, 448 U.S. at 145. No express congressional statement of preemptive intent is required. "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache Tribe, supra*, 76 L.Ed.2d at 620.

The Morongo-Naegele outdoor advertising agreement is part of a complex network of federal and tribal laws, all of which are designed to ensure that the Morongo Band can take advantage of its single most valuable asset, the reservation's suitability for outdoor advertising. Thus, the Band enacted an ordinance giving its business committee full authority to negotiate and execute agreements

for outdoor advertising on the Morongo reservation, and in 1977 the committee conducted negotiations with several outdoor advertising companies for the purpose of establishing an on-reservation outdoor advertising business. In 1978 the Band enacted its Land Use Ordinance #1, by which it designated the lands along Interstate 10 as suitable for commercial development. When, during the spring and summer of 1979, the State cited Naegele for claimed violations of the Outdoor Advertising Act, the Band forbade Naegele to obtain State outdoor advertising permits.

The Interior Department too has been extensively involved in facilitating and overseeing the Board's outdoor advertising enterprise. On December 13, 1979, the Interior Board of Indian Appeals ruled that the HBA does not apply to Indian reservations and directed the Area Director to effectuate a business lease for outdoor advertising. On February 2, 1984, the Acting Superintendent of the Southern California Agency of the BIA approved the Morongo-Naegele outdoor advertising agreement for a period of ten years, retroactive to the date of its execution (i.e., March 30, 1978). The approval did not state whether it was executed pursuant to the authority conferred by the Act of September 21, 1959, 73 Stat. 597 (codified as amended at 25 U.S.C. § 415) or 25 U.S.C. § 81 (Acts of March 3, 1871, ch. 120, § 3, 16 Stat. 570 and May 21, 1872, ch. 177, §§ 1 & 2, 17 Stat. 136, *amended by* Pub. L. 85-770 (1958)). However, both statutes require the approval of the Secretary of the Interior and bring into play a variety of federal requirements.

It is this complicated network of federal and tribal statutes, ordinances, regulations, administrative decisions

and policies which the Department would thrust aside so that it can control on-reservation outdoor advertising from outside the reservation. Obviously, allowing either exclusive or concurrent State jurisdiction would effectively nullify the Morongo Band's right to conduct and control outdoor advertising on its reservation. It would, in the words of this Court, "wholly . . . supplant tribal regulations" and allow the State "to dictate the terms on which non-members are permitted to utilize the reservation's resources." *New Mexico v. Mescalero Apache Tribe, supra*, 76 L.Ed.2d at 623. The Band would exercise authority over on-reservation outdoor advertising only at the sufferance of the State. *See id.*

State jurisdiction over the Morongo Band's on-reservation outdoor advertising would also strike at the heart of the Band's and the federal government's attempts to encourage tribal self government and economic development. It would strip the Band of the single means by which it could achieve the economic self-sufficiency which is the declared goal of current federal Indian policy. *See* 1 *American Indian Policy Review Commission: Final Report*, 3, 6, 8 & 13-21 (submitted to Congress on May 17, 1977); President Ronald Reagan's Indian Policy Statement of Jan. 24, 1984 (Appendix 4 hereto).

Against these federal and tribal interests must be weighed the State's claimed interest. This Court has stated that any exercise of state authority which imposes additional burdens on a tribal enterprise "must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity." *New Mexico v. Mescalero Apache Tribe, supra*, 76 L.Ed.2d at

622. The Department has never claimed that the State furnishes any on-reservation service that benefits the Band.

In an effort to substantiate its claimed interest in regulating on-reservation outdoor advertising, the Department argues that the freeway itself must be regarded as being off the reservation. This contention is mistaken, however. As this Court recently reaffirmed in *Solem v. Bartlett*, — U.S. —, 179 L.Ed.2d 443, 104 S.Ct. 1161 (1984), land remains "Indian country" as long as it lies within the boundaries of an Indian reservation. *See also Seymour v. Superintendent*, 368 U.S. 351, 358, 7 L.Ed.2d 346, 82 S.Ct. 351 (1982). Such is the case here.

The State's claimed aesthetic interest is disingenuous at best. If there is scenery which would be enhanced by the eradication of outdoor advertising, most of it is on the Morongo reservation, which lies on both sides of Interstate 10 and extends to the north all the way to the mountaintops which form the skyline. Must the Band suffer regulation by the State for the sake of the latter's claimed interest in the view afforded by the reservation?

Finally, it must at all times be remembered that the HBA itself states that "the Secretary [of Transportation]," *not the states*, has responsibility for implementing the Highway Beautification Act on federal lands. *See* 23 U.S.C. § 131(h). This itself strongly suggests that Congress regarded as negligible any claimed interest of the states in regulating outdoor advertising on *any* federal lands.

Naegele respectfully submits that there is a comprehensive tribal and federal scheme enabling and controlling the use of the Morongo Band's reservation for outdoor ad-

vertising, and that this scheme would be disrupted and its goals frustrated if California could enforce its outdoor advertising laws on the reservation. Further, the on-reservation enforcement of the California Outdoor Advertising Act would directly and seriously impair the right of the Band to regulate reservation land use. California therefore is preempted from exercising regulatory jurisdiction over outdoor advertising on the Morongo reservation, regardless of whether the California Supreme Court correctly held that the HBA also preempted the California Outdoor Advertising Act on traditional, non-balancing grounds.

4. The Morongo Band Of Indians Is An Indispensable Party That Cannot Be Joined, And Therefore This Action Should Be Dismissed.

As already indicated, the California Supreme Court refrained from ruling on Naegele's claim that the Morongo Band is an indispensable party that cannot be joined. Naegele again respectfully submits, however, that this action should now be dismissed for this reason.

California's Code of Civil Procedure Section 389 deals with joinder of parties and indispensable parties. In 1971 it was revised to conform substantially to Rule 19 of the Federal Rules of Civil Procedure. Code Civ. Proc. § 389, Law Revision Commission Comment, 1971 amendment. Like Rule 19, Section 389 sets forth a two-step procedure for determining (1) whether a party or entity not named as a defendant is a "necessary party," that is, one which should be "joined if feasible," and (2) if so, whether the action should be dismissed because the person not joined is an "indispensable party." C.C.P. § 389(a) & (b); *Vanoni v. County of Sonoma*, 40 Cal. App. 3d 743, 746-47, 115

Cal. Rptr. 485 (Ct. App. 1974); *cf. Bakia v. County of Los Angeles of State of Cal.*, 687 F.2d 299, 301 (9th Cir. 1982) (per curiam). Obviously, the Department of Transportation is requesting relief which, if granted, would entail serious adverse consequences to the Band, to wit, (1) the invalidation of the Morongo-Naegele lease agreement insofar as it purports to authorize signs that violate the California Outdoor Advertising Act, and (2) displacement of tribal regulatory jurisdiction.

Federal decisions construing Rule 19 of the Federal Rules of Civil Procedure have found the mere possibility of such adverse consequences sufficient to make an Indian tribe a "necessary party" within the meaning of Rule 19(a). In the following cases, the courts held that an unjoined Indian tribe was a *necessary* party because the action would have had the effect of invalidating a lease or other agreement to which the tribe was a party. *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975), *cert. denied sub nom., Susenkewa v. Kleppe*, 425 U.S. 903, 47 L.Ed.2d 752, 96 S.Ct. 1492 (1976); *Tewa Tesuque v. Morton*, 498 F.2d 240, 242 (10th Cir. 1974), *cert. denied*, 420 U.S. 962, 43 L.Ed.2d 440, 95 S.Ct. 1353 (1975); *National Indian Youth Council v. Andrus*, 501 F. Supp. 649, 681-82 (D.N.M. 1980), *aff'd sub nom., National Indian Youth Council v. Watt*, 644 F.2d 220 (10th Cir. 1981); *Yazzie v. Morton*, 59 F.R.D. 377, 383 (D. Ariz. 1973). An Indian tribe is also a necessary party to any action which would limit the scope of its sovereign rights (*Northern Cheyenne, etc. v. Adsit*, 668 F.2d 1080, 1089-90 (9th Cir. 1982), *rev'd on other grounds, Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 77 L.Ed.2d 837, 103 S.Ct., 3201 (1983)), including

the tribe's right to control its own reservation lands (*Yazzie v. Morton, supra*, 59 F.R.D. at 383).

Because the language and intent of Rule 19 and Section 389 are virtually the same, federal decisions construing the proper application of Rule 19 may appropriately be consulted in determining the proper application of Section 389. *Conrad v. Unemployment Ins. Appeals Bd.*, 47 Cal. App.3d 237, 241, 120 Cal. Rptr. 803 (Ct. App. 1975). The Band must therefore be regarded as a person who, pursuant to Section 389(a), "shall be joined as a party. . . ."

The Morongo Band cannot be joined, however. It is a fundamental tenet of American Indian Law that Indian tribes enjoy sovereign immunity from suit. They cannot be sued in either federal or state court unless Congress or the tribe consents to such suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 56 L.Ed.2d 106, 98 S.Ct. 1670 (1978).

The question remaining, therefore, is whether this action should have been allowed to proceed, in spite of the fact that the Band could not be joined. Like Subsection (b) of Rule 19, Section 389(b) sets forth four criteria to be considered in determining whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable." *Cf. Bakia v. County of Los Angeles of State of Cal., supra*, 687 F.2d at 301. The four considerations are:

(1) The extent to which a judgment rendered without the absentee would prejudice it or the existing party;

(2) The extent to which prejudice can be alleviated or avoided by other measures;

(3) The adequacy of a judgment rendered without the absentee; and

(4) The adequacy of plaintiff's remedies if an action is dismissed for nonjoinder. Cal. Code Civ. Proc. § 389(b).

Here, the trial and appellate courts allowed a significant infringement of the Morongo Band's inherent sovereign rights, even though the Band was not a party to the action and could not be joined. This was error. Where, as here, the validity of an important tribal agreement with a non-Indian has been attacked, the courts have not hesitated to hold that the tribe was indispensable and, therefore, the action had to be dismissed. Each of *Lomayaktewa, Tewa Tesuque, National Indian Youth Council* and *Yazzie*, was an action to invalidate a lease between a tribe and a non-Indian, and in each the court held that the tribe was an indispensable party because, among other things, cancellation of the lease would severely prejudice the interests of the tribe. Validation of a lease is not, of course, the only kind of harm which requires that a tribe be deemed indispensable. *See Northern Cheyenne, etc. v. Adsit, supra*, 668 F.2d 1080 (action involving tribal water rights).

The first of the four factors enumerated in Subsection (b) of Section 389 therefore is clearly satisfied.

The second factor under Section 389(b) is the extent to which, by protective provisions in the judgment, preju-

dice to the absent party can be lessened or avoided. Here, that is not possible. As the decisions below illustrate, granting relief to the State deprives the Band of the right to determine the circumstances under which it will allow outdoor advertising on its reservation lands. The possibility of such prejudice cannot be eliminated. Therefore, dismissal is required. *See Lomayaktewa v. Hathaway, supra,* 520 F.2d at 1326.

The third factor under Section 389(b) is whether the judgment rendered in the person's absence will be adequate. Here, any judgment in the tribe's absence is for all intents and purposes unenforceable: Naegele neither owns the signs nor has authority to remove them without the consent of the Band. Further, the Band is not a party to the judgment in this action. The situation is exactly like that in *Lomayaktewa v. Hathaway, supra,* where the plaintiffs sued to invalidate a lease between the Hopi Tribe, as lessor, and a non-Indian corporation, as lessee, but did not name the tribe as a defendant. The Ninth Circuit considered it "perfectly apparent that any judgment rendered in the Tribe's absence would not be adequate." *Id.* at 1326.

The fourth factor is the adequacy of the plaintiff's remedies if the action is dismissed. Code Civ. Proc. § 389 (b). The plain fact of the matter is that the State has mounted an action which ought properly to have been brought against the Band, not Naegele. However, the plaintiffs are barred absolutely from suing the Band; they can no more sue the Band here than they could anywhere else. Therefore, there is no underlying enforceable right of action; dismissal effects no deprivation of a right.

The Department's entire action must be dismissed, because the Morongo Band is an indispensable party that cannot be joined.

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CONCLUSION

For the foregoing reasons, respondent Naegele respectfully requests that the Court deny the Department of Transportation's petition for writ of certiorari, or, alternatively, that the Court remand the action with directions to dismiss for failure to join an indispensable party that cannot be joined.

Dated: November 7, 1985.

Respectfully submitted,

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Attorneys at Law

By: RICHARD CROSS, ESQ.

Attorneys for Respondent Naegele Outdoor Advertising Company of California, Inc.

APPENDIX 1

ADMINISTRATIVE APPEAL OF
THE MORONGO BAND OF MISSION INDIANS

v.

AREA DIRECTOR, SACRAMENTO AREA OFFICE

7 IBIA 299

Decided *December 13, 1979*

Appeal from Area Director's decision disapproving a proposed lease of trust land for outdoor advertising purposes.

Reversed.

1. Act of Oct. 22, 1965—Bureau of Indian Affairs: Generally—Indian Tribes: Generally

Title I of the Highway Beautification Act, 79 Stat. 1028, which applies to all "public lands reservations of the United States," does not apply to Indian Reservations.

2. Act. of Aug. 15, 1953—Indian Tribes: Generally

Public Law 280, 67 Stat. 588-590, did not grant to states general civil regulatory powers over Indian reservations. Nor could this be accomplished by Departmental regulation. Secretarial Order or other directive.

3. Act of Oct. 22, 1965—Bureau of Indian Affairs: Generally—Indian Tribes: Generally

California's Outdoor Advertising Act, implementing the Highway Beautification Act, 79 Stat. 1028, may not be applied to non-Indian lessees on the Morongo Indian Reservation.

4. Act of Oct. 22, 1965—Bureau of Indian Affairs: Generally—Indian Tribes: Generally

The Department's policy established in 1965 of requiring lessees of Indian lands in California to comply with State standards regulating land use and development can be achieved without subjecting developing tribal governments to the full enforcement powers of the State, viz, through adding appropriate State standards to the provisions of any lease.

APPEARANCES: Stephen V. Quesenberry, Esq., California Indian Legal Services, for appellant; James E. Goodhue, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Riverside, California, for respondent.

OPINION BY CHIEF
ADMINISTRATIVE JUDGE HORTON
INTERIOR BOARD OF INDIAN APPEALS

The appeal decided here involves a claim by the Morongo Band of Mission Indians (appellant) that the Area Director, Bureau of Indian Affairs, Sacramento Area Office (respondent), erred in refusing to approve a lease agreement between the Band and the Naegele Outdoor Advertising Co., Inc., of California, for the purpose of erecting and maintaining outdoor advertising structures on the Morongo Indian Reservation.

The Area Director's decision at issue was rendered Mar. 14, 1978.[1] A notice of appeal was timely filed from this decision by California Indian Legal Services on behalf of appellant on Apr 17, 1978, pursuant to 25 CFR Part 2. By memorandum dated Mar. 27, 1979. Acting Deputy Com-

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[1]The Area Director's decision affirmed a determination made by the Superintendent, Southern California Agency, BIA, dated Aug. 29, 1977.

missioner of Indian Affairs Martin E. Seneca, Jr., referred this appeal to the Board of Indian Appeals for resolution in accordance with the provisions of 25 CFR 2.19.[2]

In reviewing the decision appealed from and the briefs submitted by the parties, it is clear that resolution of this appeal depends primarily on the answer to the following question: To what extent, if any, does the Highway Beautification Act of 1965, 79 Stat. 1028, 23 U.S.C. § 131 (1976), apply to Indian reservations?

BACKGROUND

The genesis of this appeal can be traced to the struggle of the Morongo Band of Mission Indians to develop economically. This background is detailed in appellant's brief dated July 1, 1978, from which the following summary is adduced:

The Morongo Indian Reservation occupies approximately 32,300 acres of land in Riverside County, California, and is inhabited by nearly 300 members of the Morongo Band of Mission Indians. Because the reservation lies astride a narrow pass between the San Bernardino and San Jacinto Mountain Ranges, only the few rela-

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[2]This regulation provides in relevant part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs shall:

"(1) Render a written decision on the appeal or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

tively flat acres located in the plain are suitable for economic development. A planning study conducted for the Band in 1972 identified a total of less than 1 square mile of reservation land as suitable for economic development. All of that land lies adjacent to Interstate Highway 10, which is a major east-west artery for travel to and from the metropolitan areas of southern California.

In addition to the Interstate Highway, the reservation is crossed by a main line of the Southern Pacific Railroad, the Colorado River Aqueduct, major oil tranmission [*sic*] pipelines, national gas pipelines, and numerous electrical transmission lines, all of which serve the metropolitan Los Angeles area without any significant benefit to the reservation or its residents.

Despite the reservation's seemingly advantageous location for economic developments, its economy is depressed and its population poor. The unemployment rate on the reservation is approximately 50 percent.

For many years a major source of income for the Morongo Band has been derived from outdoor advertising activities on tribal lands adjacent to Interstate Highway 10.[3] Because the foregoing lands consist of property held in trust by the United States for the benefit of the Morongo Band, any tribal lease of the property for business purposes requires approval by the Secretary of the Interior pursuant to the provisions of 25 U.S.C. § 415 (1976), and regulations found in 25 CFR Part 131. The Bureau has

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[3]In an appraisal report dated Oct. 13, 1977, the Southern California Appraisal Office, BIA, identified outdoor advertising as "the highest and best use of reservation land along Interstate 10."

refused to approve the Morongo Band's advertising lease with the Naegele company on grounds that the outdoor advertising proposed in the lease violates requirements of the Highway Beautification Act and California State law promulgated thereunder.[4]

DISCUSSION, FINDINGS AND CONCLUSIONS

Certain preliminary questions are answered before we address the main issue. First, the Field Solicitor (who represents the Area Director on appeal) asserts that it is inappropriate for the Board to entertain this appeal because the issues involved are the subject of litigation in *State of California v. Naegele Outdoor Advertising Co. of California, Inc.*, No. 126069, Superior Court of the State of California, County of Riverside. This is an action brought by the State of California, through its Department of Transportation, against the Naegele company for violations of California's Outdoor Advertising Act, Bus. & Prof. Code §§ 5200-5486, allegedly committed by the company in advertising activities on the Morongo Reservation.

There are indeed questions of law at issue in the foregoing case which also arise in this administrative proceeding, such as whether the Congress intended the Highway Beautification Act to apply to Indian reservations. The precise issue in the State Court proceeding, however,

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[4]The Area Director's decision does not recite specific findings of fact or conclusions of law. In lieu thereof, the Area Director states:

"In view of the Riverside Field Solicitor's Opinion: Secretarial Order of July 9, 1965, 30 F.R. 8722: Solicitor's Opinion dated April 7, 1967, and circumstances surrounding the lease proposal of Naegele Outdoor Advertising Company, I hereby affirm the Superintendent's decision of Aug. 29, 1977."

does not involve the lease dispute now before the Board. In this regard, neither the Morongo Band nor the Department of the Interior is a party to the action. In the absence of any court injunction or Secretarial directive precluding the Board from deciding the subject appeal, there is no legal reason why the Board cannot do so. Further, considerations of policy do not favor the continuation of disputes which are ripe for decision. Here, appellant has been pursuing a final administrative determination from the Department for over 1½ years. For the above reasons, the Board rejects respondent's contention that consideration of this appeal should be deferred or denied.[5]

Subsequent to the Area Director's disapproval of the lease at issue, the Morongo Band entered into an "agency agreement" with the Naegele Company in March, 1978. This agency agreement is explained by appellant in its brief dated July 1, 1978, as follows:

During the pendency of these various appeals, the Business Committee of the Morongo Band, pursuant to the authority vested in it through the Band's enactment of Proposition 4 at its General Election of December 14, 1963, continued to consider the possibility of establishing an outdoor advertising industry on the Morongo Indian Reservation because of its potential for creating employment for Band members and for creating an income for the Morongo Band. After lengthy deliberations, it was decided that the most advantageous and expeditious way for the Band to

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[5]The Field Solicitor refers to another California suit. *State of California v. Hadley Fruit Co.*, Civ. No. 106415, Superior Court of California, County of Riverside, as one with a direct bearing on the issues before the Board. Appellant disagrees. The Board is informed that the above case has been settled.

do so would be for the Band to establish its own outdoor advertising enterprise immediately. Because the Band lacked the necessary technical expertise to do so immediately, the Band engaged an agent to commence and to operate certain aspects of this enterprise for the Band during a period when the Band would acquire its own expertise in the business. The Band has entered into an Agency Agreement with its agent [Naegele Outdoor Advertising Company of California, Inc.] for this purpose.

The Field Solicitor submits that appellant is "attempting to convert the appeal from the refusal to approve the lease into an Interior Board of Indian Appeals' ratification of an agency agreement [summarized above] and the Band's operation of an outdoor advertising sign business." Answer Brief filed June 4, 1979, at 2. Appellant denies this charge and maintains that Departmental ratification of the Band's agency agreement with the company is not required. Appellant's Reply Brief filed June 22, 1979, at 1-2.

It is neither necessary nor appropriate for the Board to render an opinion regarding the March 1978 "agency agreement." The Board's jurisdiction in administrative appeals is limited to a review of specific action taken by BIA officials in the performance of their duties under Chapter I of Title 25 of the *Code of Federal Regulations*, 43 CFR 4.350-4.353. To our knowledge, no BIA action has been taken regarding the agency agreement.[6] If some

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[6]According to the Field Solicitor, "at no time was the so-called agency agreement ever presented to the Superintendent, Southern California Agency, or the Area Director for approval." Answer Brief at 2.

BIA action has occurred regarding the agreement, it is not reviewable by this forum in the absence of a proper appeal therefrom.

Thus, the sole question to be decided here is whether it was error for the Area Director to disapprove the proposed lease of trust land on the Morongo Indian Reservation to the Naegele company.[7]

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[7]The terms of the proposed lease are set forth in a letter to the Morongo Band Tribal Council from the Naegele Company, dated Aug. 10, 1977, which reads as follows:

"Gentlemen:

"Confirming our meeting and proposal to the Morongo Tribal Council on Aug. 8, 1977, we would like to propose the following for your approval.

"1. We would like to lease the North side of sections 10 and 12 and the South side of section 8 located on Freeway Interstate 10. We will only lease enough ground space to erect single pole signs. Each advertising structure will only have one pole with the ground base approximately thirty six inches in diameter.

"2. At this time, our plans call for fifteen different single pole structures, spaced approximately 1000 ft. apart. As we understand, your sections are one mile long on the freeway side. This will allow us to build five on each of the proposed sections.

"3. In order for Naegele to lease the above mentioned property, the Morongo Indians will have to own the poles for each advertising structure. Naegele will furnish and erect each pole and sell them to the Morongos for one dollar each. We can then lease the top of the pole for a total of $6,500 per year plus the annual increase as outlined on the attached page. At the end of our lease agreement we will buy back the poles for one dollar each or enter into a new lease at the agreement of both parties.

"4. The annual payment of $6,500 plus, will be made in annual installments in advance beginning Jan. 1, 1978. The

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The statutory authority which permits the leasing of Indian trust land for such business purposes as outdoor ad-

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payment schedule above will be established by the fact that we will have approval to start construction on the locations by October 1, 1977.

"5. In the event of future development of Morongo property, we will move our structure, including the pole fifty or one hundred feet or wherever it will not interfere with the development. This will be done at no cost to the Morongo Indians.

"6. The Hadley outdoor advertising signs can remain as far as we are concerned. But all other advertising signs will be removed by us as their leases expire with you. The reason for this is, we do not want to create outdoor advertising clutter. We would like to have an exclusive right to lease any and all property that you want to lease for advertising on any road or freeway. This will also allow you to expect and get prompt payment from one advertising company, the 3rd largest outdoor advertising company in the United States.

"7. In the event the state finds a way or passes a law to prevent Naegele from leasing the top of each of your single poles through condemnation or whatever, we will pay you the lease money owed through the day we are forced to take down our signs and poles.

"8. Naegele will maintain all advertising structures, including the poles at no cost to the Morongos. We will also assume all cost for illumination and service for the signs. Naegele will also carry all insurance for liability. We will at all times protect the interest of the Morongo Indians.

"9. We will only build standardized outdoor structures, 14′ x 48′ with space for extensions, please see photo, or we will not exceed 1,200 sq. ft., which will meet state approval.

"10. We will also need the right of ingress and egress of the premises to erect, place and maintain all advertising signs and structures and any equipment therefore and post, paint or illuminate and maintain advertisements or such structures.

Very Truly Yours

Leon E. Howell
President"

vertising is the Act of Aug. 9, 1955, 69 Stat. 539, *as amended*, 25 U.S.C. § 415 (1976). The Act provides that restricted Indian lands, whether tribally or individually owned, may be leased only with the approval of the Secretary of the Interior. In addition to prescribing the term of years for leases consummated under the Act, the statute provides:

> Prior to approval of any lease * * * the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject. [Act of June 2, 1970, § 2, 84 Stat. 303.]

The Department's regulations governing the leasing of Indian land are set forth in 25 CFR Part 131. These regulations are primarily aimed at insuring proper economic return to Indian lessors. *See* 25 CFR 131.5.

Based on the authorities incorporated by reference in the Area Director's decision (*see* n.4, it appears that the Area Director disapproved the proposed lease on grounds that California and Federal laws controlling outdoor advertising along Interstate Highways were not satisfied by the provisions of the lease.

On appeal the Morongo Band has presented a comprehensive attack on the validity of the Area Director's action. Among other things, the Band alleges the following:

1. The Highway Beautification Act does not apply to Indian reservation lands.

2. Neither the Highway Beautification Act, Public Law 280, or any other proper legal authority confers on California power to implement its Outdoor Advertising Act on Indian reservations.

3. The Highway Beautification Act and the California Outdoor Advertising Act do not apply to non-Indian lessees of Indian trust lands.

4. The policy of the Secretary of the Interior to apply state land use standards to leases of Indian trust lands can be accomplished without subjecting the Band to state jurisdiction and enforcement measures.

DOES THE HIGHWAY BEAUTIFICATION ACT APPLY TO INDIAN RESERVATION LANDS?

The Highway Beautification Act of 1965, *as amended*, was enacted by Congress to provide for scenic development and road beautification of the Federal-aid highway systems. Title I of the Act (23 U.S.C. § 131 (1976) contains requirements for the control of outdoor advertising. At 23 U.S.C. § 131(h), the Act provdes:

(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary [in 1965, the Secretary of Commerce; now the Secretary of Transportation].

[1] In a memorandum opinion to the Commissioner of Indian Affairs dated Apr. 7, 1967, the Associate Solici-

tor for Indian Affairs concluded that "reservations of the United States" as used in subsec. (h) of 23 U.S.C. § 131 includes Indian reservation.[8] Upon careful review, we conclude that the Associate Solicitor's opinion does not reflect the state of the law on this subject.

The 1967 opinion relies primarily on the Department's disposition of three cases rendered over 65 years ago concerning rights-of-way across "reservations" for canal and ditch purposes.[9] At issue was whether the term "reservations" as used in the Act of Mar. 3, 1891, § 18, 26 Stat. 1101, 43 U.S.C. § 946 (1976), includes Indian reservations. The Department ruled in the affirmative and this position was followed by a Federal court in 1914. *United States v. Portneuf-Marsh Valley Irr. Co.*, 205 F. 416 (E.D. Ida. 1913), *aff'd*, 213 F.601 (9th Cir. 1914).

As appellant argues on appeal, the Act of Mar. 3, 1891, vests power in the Secretary of the Interior to disapprove a right-of-way grant whenever he determines that approval thereof would be injurious to an Indian reservation.[10] On

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[8]In his concluding paragraph, the Associate Solicitor states that outdoor advertising on Indian reservation lands is subject "to regulations under the act." The opinion does not address whether outdoor advertising on Indian reservations is subject to both Federal and state regulation.

[9]27 L.D. 421 (1898), overruling 14 L.D. 265 (1892); 33 L.D. 568 (1905); and 42 L.D. 595 (1913).

[10]The statutory proviso reads in pertinent part: *"Provided.* That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation." 43 U.S.C. § 946 (1976). With respect thereto, see 27 L.D. 421, 423-424, 33 L.D. 563, 565 and 42 L.D. 595, 600, *supra*. In *U.S. v. Portneuf-Marsh Valley Irr. Co., supra*, the Federal district court stated:

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the other hand, the Highway Beautification Act of 1965, which relies on state action to enforce its standards, *see* 23 U.S.C. § 131(b)—(k) (1976), contains on special protection for Indian interests.

One indication that the Department has not considered the Highway Beautification Act applicable to Indian lands is its own regulatory response to the statute. In December 1970, the Secretary issued regulations invoking and expanding the outdoor advertising standards of the Highway Beautification Act with respect to public lands managed by the Bureau of Land Management, 43 CFR 2921.0-6. No such regulations have been issued by the Secretary with respect to Indian lands.

That the Highway Beautification Act was not intended to apply to Indian reservations is apparent from the enforcement provisions of the law. Under the Act, states are subject to a 10 percent reduction in Federal highway funds if they fail to regulate outdoor advertising in accordance with national standards. 23 U.S.C. § 131(b). States are authorized to employ their zoning or condemnation powers to achieve compliance with the Act. Sec. 131 (d)-131(g); 23 CFR 750.301-308. States may even impose stricter limitations than are found in the Act in controlling outdoor advertising. Sec. 131(k); 23 CFR 750.110, 750.155.

For the above measures to be taken by states on Indian reservations two well-established legal principles are

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"It is pointed out that there is no apparent reason why an Indian reservation should not be subject to the grant of a right of way the same as any other reservation, especially in view of the fact that the Executive Department having jurisdiction thereof may determine whether a right of way can be granted without injury to the general purpose of the reservation, and extend or withhold approval accordingly." 205 F. 416, 419.

necessarily forsaken; first, that tribally owned Indian reservation land is not subject to state powers of eminent domain. *Minnesota v. United States,* 305 U.S. 382 (1939); *United States v. 10.69 Acres of Land,* 425 F.2d 317 (9th Cir. 1970),[11] and second, that states are not authorized to enforce their land use regulations on Indian reservations. *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 605 (9th Cir. 1975. *cert. denied,* 429 U.S. 1038 (1977).

Unquestionably, the Congress which has plenary authority over Indian affairs, *United States v. Kagama,* 118 U.S. 375 (1886), has the power to subject Indian reservations to the type of state regulation generally authorized in the Highway Beautification Act. However, based on principles enunciated by the Supreme Court in *Williams v. Lee,* 358 U.S. 217 (1959), regarding the limits of state power over Indian affairs, it is the Board's position that absent clear Congressional license to the states to control outdoor advertising on Indian reservations, such an intrusion by the states into "the right of reservation Indians to make their own laws and be ruled by them" is without sanction.

The term "reservation" is one broadly used "to describe any body of land, large or small, which Congress has reserved from sale of any purpose." *United States v. Celestine,* 215 U.S. 278 (1909). It may include military reservations, national forests, national parks, or any other Federally protected reserve.[12] Indian reservations are

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[11]Allotted lands are subject to state condemnation. Act of Mar. 3, 1901, 31 Stat. 1084, 25 U.S.C. § 257 (1976).

[12]In concluding that the phrase "public lands and reservations of the United States" as found in the Act of Mar. 3, 1891,

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unique, however, since vital rights are vested in the Indians and tribes located thereon. Appellant refers to the Buck Act.[13] as a clear example of Congressional recognition that Indian reservations are distinguishable from all other Federal reservations. As originally proposed, this Act would have allowed a state to impose its sales tax, use tax or income tax within "Federal areas," alternatively described as Federal "reservations" in the title of the bill. A series of inquiries from the Department of the Interior eventually led to a clarifying provision in the bill excepting reservation Indians from the coverage of the Buck Act.[14]

In the case before us, absence of statutory language expressly including or excluding Indian reservations as territory subject to the Highway Beautification Act renders the term "reservations" as used in sec. 131h), ambiguous. This ambiguity has been recognized by the Department of Transportation, the Federal agency primarily responsible for national enforcement of the Act. By memorandum dated Dec. 19, 1977, an assitant [*sic*] chief counsel of the Federal Highway Administration furnished the Department of the Interior with a draft proposed amendment to 23 U.S.C. § 131(h) aimed at bringing Indian reservation areas within certain coverages of the Highway Beautification Act.[15]

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included Indian reservations, the Appeals Court noted in *United States v. Portneuf-Marsh Valley Irr. Co., supra,* that "[a]t the date of that act the Indian reservations were the only considerable reservations of the United States." 213 F. 601, 603.

[13]Act of July 30, 1947, 61 Stat. 641, 4 U.S.C. §§ 104-110 (1976).

[14]4 U.S.C. § 100 (1976). See Appellant's opening brief filed July 5, 1978, at 4-7.

[15]See pp. 41-46, Appellant's Attachments to Brief on Appeal, filed July 5, 1978. Among other things, the draft amendment called for a voluntary removal program on Indian reservation lands of nonconforming outdoor advertising signs.

To our knowledge, the legislative history of 25 U.S.C. § 131 (1976) reveals no reference to Indian reservations whatsoever. However, implicit in statements of the House Public Works Committee regarding the legislation is the recurring theme that enforcement of the Act could effectively be achieved through the zoning and condemnation powers enjoyed by states. House Report No. 1084, 89th Congress, 1st Sess., found in 1965 *U.S. Code Cong. & Adm. News*, pp. 3710-3736.[16] As previously stated, however, we believe these powers may be exercised by states on Indian reservations only when Congress expressly so authorizes. Under the circumstances, we find that the legislative history of the Highway Beautification Act supports the conclusion that Congress did not intend to include Indian reservations within the class of reservations affected thereby.

In ascertaining this intent of Congress, it is instructive that Indian lands are specifically identified in other Acts relating to the Federal-aid highway systems as appropriate. *See* 23 U.S.C. §§ 101(a), 103(b)(1), 120(a), 120(f), 120(g), 125(c), 203, 208, and 217(c). Congress obviously knew when and how to include language relating to Indian reservations in its Federal highway plan.

Appellant submits that in accordance with recognized canons of construction, doubtful statutory language must be interpreted in favor of the Indians. This is undoubtedly

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[16]The regulations of the Federal Highway Administration concerning condemnation under the Act specify that they "should not be construed to authorize any additional rights in eminent domain not already existing under State law or under 23 U.S.C. 131(g)." 23 CFR 750.301.

true with respect to Federal statutes dealing with Indians. *Worcester v. Georgia,* 31 U.S. (6 Peters) 214, 261 (1832); *Santa Rosa Band of Indians v. Kings County, supra; State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* — U.S. —, 58 L.Ed.2d 740, 758 (1979). Where the Federal statute involved is one of general applicability, such as the Highway Beautification Act, some courts are prone to apply normal rules of construction instead of rules which favor Indians. *See United States v. Allard,* 397 F. Supp. 429 (D. Mont. 1975); *cf. United States v. White,* 508 F.2d 453 (8th Cir. 1974).

In this case, it cannot be said that Indians are similarly affected as the general public if sec. 131(h) is deemed applicable to Indian reservations. Such a ruling would significantly alter the tribal sovereignty possessed by Indian nations. Since states have the authority under the Act to impose standards stricter than in the Act itself, such a ruling could mean economic termination of a tribe such as the Morongo Band whose primary source of income is derived from outdoor advertising. Because of the unique tribal interests at stake here, it is not inappropriate to apply the rules of construction urged by appellant, notwithstanding the general nature of the Act in question. So doing, we are all the more satisfied that Congress did not intend the Highway Beautification Act to apply to Indian reservations.

PUBLIC LAW 280 AND DEPARTMENTAL STANDARDS

[2] The Field Solicitor submits that the California Outdoor Advertising Act may be enforced on Indian reservations by virtue of a Secretarial Order of July 2, 1965,

published at 30 FR 8722. This directive (signed by Under Secretary John A. Carver) provides in part:

> Pursuant to § 1.4(b), Title 25, Code of Federal Regulations (30 F.R. 7520), the Secretary of the Interior does hereby adopt and make applicable, subject to the conditions hereinafter provided, all of the laws, ordinances, codes, resolutions, rules or other regulations of the State of California, now existing or as they may be amended or enacted in the future, limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States and located within the State of California.

The Field Solicitor points out that the above Secretarial directive has been construed by a California court as vesting the State with authority to apply its laws to lessees of Indian lands. *County of San Bernardino v. LaMar*, 76 Cal Rptr. 547 (1969).

In a March 1970 opinion, former Secretary of the Interior Walter J. Hickel clarified the Department's position with respect to the 1965 Secretarial directive and expressly stated that the Department had no intention of following the ruling in *County of San Bernardino, supra,* noting that the United States was not a party to the litigation and had no notice of its pendency,[17] Secretary Hickel stated that, a

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[17]Mr. Hickel's opinion appears as appendix A to Appellants' Supplemental State in Support of Appeal, filed May 3, 1979. It is an unpublished opinion directed to interested parties in the zoning of lands of the Agua Caliente Indian Reservation in Palm Springs.

most, California laws were noticed by the Department as standards for the agency to follow in approving leases of Indian land.

The Secretarial directive of 1965 and 25 CFR 1.4(b) are apparent attempts of the Department to apply or interpret the aims of Congress in its enactment of the Act of Aug. 15, 1953, 67 Stat. 558-590, *a amended,* commonly known as Public Law 280.[18] In 1976, the Supreme Court rendered the definitive decision that Public Law 280 did not grant to states general civil regulatory powers over Indian reservations. *Bryan v. Itasca County,* 426 U.S. 373, 390 (1976). The Court's decision in *Bryan* is consistent with Mr. Hickel's 1970 opinion that the Secretarial directive of 1965 was not a general jurisdictional grant to California to apply its regulatory laws in Indian country. Clearly, only Congress may accomplish such a result.

The Field Solicitor further contends that the California Outdoor Advertising Act is a prohibitory statute and thus comes within the purview of the criminal jurisdiction provisions of Public Law 280. It is the case that California has made any violation of its Act a misdemeanor. *Bus. and Prof. Code,* § 5464.

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[18]The 1965 order contains the following proviso: "Nothing contained in this notice shall be construed in any way to alter or limit the provisions of sections 2(b) and 4(b) and (c) of the Act of August 15, 1953 (67 Stat. 589)." Several commentators have questioned the validity of 25 CFR 1.4 (see, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians,* 22 U.C.L.A. L. Rev. 535, 586 (1975), by Goldberg. *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands,* 26 Stan. L. Rev. 1061, 1091 (1974), by Chambers. In *Norvell v. Sangre de Cristo Dev. Co.,* 372 F. Supp. 348 (D.N.M. 1974), 25 CFR 1.4 was declared unconstitutional for lack of congressional authorization.

Appellant submits that under the above theory virtually any state licensing or regulatory law could be converted to a "criminal" law by merely providing that violation thereof constitutes a criminal offense. We agree with appellant that Indian reservations would obviously be subject to wholesale regulation by state legislatures under the above interpretation. Dictum in the Ninth Circuit's decision in *United States v. Marcyes,* 557 F.2d 1361, 1364, (9th Cir. 1977) indicates that such a procedure cannot be countenanced. We so hold here on the basis that the California Outdoor Advertising Act is clearly a regulatory law and does not fall within the criminal jurisdiction provisions of Public Law 280.

REGULATION OF NON-INDIAN LESSEES

[3] The most difficult question in this appeal is whether the proposed lease with the Naegele company would be subject to state regulation if approved by the Department because of the non-Indian character of the enterprise. If so, the Bureau of Indian Affairs should possibly not be faulted for disapproving the lease if it fails to satisfy certain requirements of California's Outdoor Advertising Act.

In *Fort Mojave Tribe v. County of San Bernardino,* 543 F.2d 1253 (9th Cir. 1976), the Appeals Court reaffirmed its earlier holding in *Agua Caliente Band of Mission Indians v. County of Riverside,* 442 F.2d 1184 (9th Cir. 1971), *cert. denied,* 405 U.S. 933 (1972), that a state possessory interest tax could be imposed on non-Indian lessees of Indian trust land. The Board has carefully evaluated the foregoing decisions and related cases. In our opinion, appellant has correctly distinguished the case at hand from those where courts have permitted state regulation of non-Indian lessees on Indian reservations:

> However, *Fort Mojave* and *Agua Caliente* are distinguishable from the situation of the Morongo Band on at least two basic points. First, different state statutes are involved which, if enforced against the non-Indian lessee, will have varying degrees of impact on tribal self-government. Assessment of a possessory interest tax on the leasehold interest of a non-Indian lessee is qualitatively different from enforcement of a land use statute (California Outdoor Advertising Act against the same lessee. Second, a corollary of the first point, is the fact that assessment of a possessory interest tax is not an attempt by the State to exercise "general civil regulatory powers" [*Bryan, supra,* 426 U.S. at 390] over reservation lands.
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> State laws regulating outdoor advertising, like other state zoning and land use laws, full within *Bryan's* prohibition against the exercise of general state civil regulatory authority on Indian reservations, absent an express grant of such authority from Congress. Moreover, the assessment of a possessory interest tax on the non-Indian lessee, unlike the regulation of outdoor advertising, is not a regulation of the use of the land and results in less of an intrusion into the areas of retained tribal sovereignty and tribal self-government. [Footnote omitted.]

Appellant's Reply Brief, filed June 20, 1979, at 18.

That the effect of state regulation on tribal sovereignty bears on the validity of a state's jurisdiction is explained in *Williams v. Lee, supra,* and *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976).

Here, we find the Morongo Band has made a persuasive showing, one which by proper accounts should have been attempted by its trustee,[19] that its self-government

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[19]Under the authority of the Mission Indian Relief Act of Jan. 12, 1891, 26 Stat. 712, the United States issued a patent on

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would be adversely affected by application of California's Outdoor Advertising Act to its non-Indian lessee.[20]

EXERCISE OF SECRETARY'S AUTHORITY

[4] Appellant observes that the Department's policy "to require lessees of Indian lands to comply with state *standards* regulating land use and development" as expressed in Secretary Hickel's 1970 opinion, "can be implemented without taking the drastic step of subjecting developing tribal governments to the full enforcement powers of the state." Appellant's Reply Brief at 20. The Band suggests that a reasonable approach would be to include State standards regarding placement, illumination, maintenance, etc., of outdoor advertising structures as provisions of any lease. The Board believes this to be a sound proposal. In undertaking this approach, however, the Bureau of Indian Affairs must insure that its own actions serve to protect tribal sovereignty.[21] This can be party [*sic*] accomplished by initially acquiring the Band's consent to the use of State standards.[22]

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Dec. 14, 1908, declaring that it would hold the lands of the Morongo Indian Reservation "in trust for the sole use and benefit of the said Morongo Band or Village of Indians."

[20]"[T]ribal use and development of tribal property presently is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life." *Santa Rosa Band of Indians v. Kings County, supra* at 684; *see also, Bryan, supra,* 428 U.S. 388, n. 14.

[21]That this duty is incumbent on the Bureau of Indian Affairs in acting on proposed leases of Indian lands is addressed in Mr. Chambers' article cited in n. 18.

[22]This procedure is desirable to bring the Secretarial directive of 1965 into compliance with the 1968 amendments of Public Law 280 regarding tribal consent. Act of Apr. 11, 1968,

(Continued on following page)

DISPOSITION

In accordance with the above discussion, findings and conclusions, the decision of the Sacramento Area Director dated Mar. 14, 1978, disapproving the proposed lease between the Morongo Band and the Naegele company is vacated. This matter is remanded to the Acting Deputy Commissioner of Indian Affairs with instructions that the Bureau of Indian Affairs seek to effectuate a business lease for outdoor advertising between the Morongo Band and the Naegele Company consistent with this opinion.

In accordance with the authority delegated the Board under 43 CFR 4.1, this decision is final for the Department.

WM. PHILIP HORTON,
Chief Administrative Judge.

WE CONCUR:

FRANKLIN ARNESS,
Administrative Judge.
MITCHELL J. SABAGH,
Administrative Judge.

(Continued from previous page)

82 Stat. 78-80, 25 U.S.C. §§ 1321-22 (1976). Tribal consent should not be a problem in this case. The Morongo Band has suggested the use of State law as a standard for regulating outdoor advertising on its reservation, and, in addition, the Band has repeatedly expressed its commitment to the general purposes of the Highway Beautification Act. See Appellant's Brief filed May 3, 1979, at 4; Appellant's Brief filed June 24, 1979, at 18-10.

APPENDIX 2

Approved for a period of 10 years retroactive to the execution of the Agency Agreement on March 30, 1978 as entered into by Thomas Lyons, Chairman, Morongo Band of Mission Indians and Leon E. Howell, President, Naegele Outdoor Advertising Company of California, Inc.

This document is executed pursuant to Sacramento Area Office Redelegation of Authority Order No. 1, July 3, 1978, which specifies under Section 2.3, that the Superintendent may exercise the authority of the Area Director in relation to the following: (f) all those matters set forth in 25 CFR 131 (now 162), except for leases and permits with terms in excess of ten (10) years. Therefore, the Acting Superintendent, Southern California Agency, herein exercises the redelegated authority. If the original agreement is unavailable, the Southern California Agency will prepare an approval page for attachment to the copy, with appropriate references to that certain agreement entered into by the parties on March 30, 1978.

Where references are made to the Band as to approvals, consents and authorizations, the words "and the Secretary" will be added after Band.

Approved in accordance with the letter of the Area Director, Sacramento Area Office, dated November 15, 1983, a copy of which by this reference is made a part hereof. See Exhibit "A".

Approved February 2, 1984 reactive [*sic*] to March 30, 1978.

/s/ William H. Gianelli
Acting Superintendent
Pursuant to the authority delegated by
209 DM 8, 10 BIAM 3.1, and Sacramento
Area Office Redelegation Order No. 1
(43 F.R. 30131).

APPENDIX 3

EXHIBIT "A"

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

Sacramento Area Office
2800 Cottage Way
Sacramento, California 95825

(SEAL)

November 15, 1983

Barbara E. Karshmer, Esq.
Attorney at Law
925 N Street, Suite 150
Fresno, California 93721-2256

Dear Ms. Karshmer:

This refers to your letter of October 27, 1983, concerning an Agency Agreement between the Morongo Band of Mission Indians and Naegele Outdoor Advertising Company. The matter was the subject of a decision from the Interior Board of Indian Appeals which held that a contemplated lease of certain lands on the Morongo Indian Reservation for outdoor advertising purposes would not be regulated by State law or the Highway Beautification Act.

Your letter requests that the Bureau of Indian Affairs seek to "effectuate a business lease for outdoor advertising between the Morongo Band and the Naegele Company", as directed by the Interior Board of Indian Appeals, in the approval of the agency agreement executed between the Band and Naegele, on March 30, 1978. You further requested that said approval be issued retroactively to March 30, 1978, in view of the Interior Board of Indian Appeals' decision and in order that the Band may attempt to per-

suade the Ninth Circuit Court of Appeals to remand the case of U.S. *ex rel Buxbom v. Naegele,* to the District Court for a new decision in light of the changed facts.

Sacramento Area Office Redelegation of Authority Order No. 1, July 3, 1978, specifies under Sec. 2.3, that the Superintendents and the Director, Palm Springs Office, may exercise the authority of the Area Director in relation to the following: (f) all those matters set forth in 25 CFR 131 (now 162), except for leases and permits with terms in excess of ten (10) years. Therefore, the Superintendent, Southern California Agency, by copy of this letter, is requested to exercise his redelegated authority with respect to your request. You are requested to provide the Superintendents, with the original agreement, if at all possible. If the original agreement is unavailable, the Southern California Agency will prepare an approval page for attachment to the copy, with appropriate references to that certain agreement entered —into by —the parties on March 30, 1978.

It is suggested that where references are made to the Band as to approvals, consents and authorizations, that "and the Secretary" be added after Band.

Sincerely,

/s/ Jess T. Town
Area Director

cc: Superintendent, SCA, w/copy of incoming for action.

APPENDIX 4

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release January 24, 1983

STATEMENT BY THE PRESIDENT

INDIAN POLICY

This Administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to state and local governments, but also to federally recognized American Indian tribes.

When European colonial powers began to explore and colonize this land, they entered into treaties with sovereign Indian nations. Our new nation continued to make treaties and to deal with Indian tribes on a government-to-government basis. Throughout our history, despite periods of conflict and shifting national policies in Indian affairs; the government-to-government relationship between the United States and Indian tribes has endured. The Constitution, treaties, laws, and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States which this Administration pledges to uphold.

In 1970, President Nixon announced a national policy of self-determination for Indian tribes. At the heart of the new policy was a commitment by the federal government to foster and encourage tribal self-government. That commitment was signed into law in 1975 as the Indian Self-Determination and Education Assistance Act.

The principle of self-government set forth in this Act was a good starting point. However, since 1975, there has

been more rhetoric than action. Instead of fostering and encouraging self-government, federal policies have by and large inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decisionmaking, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency.

This Administration intends to reverse this trend by removing the obstacles to self-government and by creating a more favorable environment for the development of healthy reservation economies. Tribal governments, the federal government, and the private sector will all have a role. This Administration will take a flexible approach which recognizes the diversity among tribes and the right of each tribe to set its own priorities and goals. Change will not happen overnight. Development will be charted by the tribes, not the federal government.

This Administration honors the commitment this nation made in 1970 and 1975 to strengthen tribal governments and lessen federal control over tribal governmental affairs. This Administration is determined to turn these goals into reality. Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination.

In support of our policy, we shall continue to fulfill the federal trust responsibility for the physical and financial resources we hold in trust for the tribes and their members. The fulfillment of this unique responsibility will be accomplished in accordance with the highest standards.

Tribal Self-Government

Tribal governments, like state and local governments, are more aware of the needs and desires of their citizens than is the federal government and should, therefore, have the primary responsibility for meeting those needs. The only effective way for Indian reservations to develop is through tribal governments which are responsive and accountable to their members.

Early in this nation's dealings with Indian tribes, federal employees began to perform Indian tribal government functions. Despite the Indian Self-Determination Act, major tribal government functions — enforcing tribal laws, developing and managing tribal resources, providing health and social services, educating children — are frequently still carried on by federal employees. The federal government must move away from this surrogate role which undermines the concept of self-government.

It is important to the concept of self-government that tribes reduce their dependence on federal funds by providing a greater percentage of the cost of their self-government. Some tribes are already moving in this direction. This Administration pledges to assist tribes in strengthening their governments by removing the federal impediments to tribal self-government and tribal resource development. Necessary federal funds will continue to be available. This Administration affirms the right to tribes to determine the best way to meet the needs of their members and to establish and run programs which best meet those needs.

For those small tribes which have the greatest need to develop core governmental capacities, this Administration

has developed, through the Assistant Secretary of the Interior for Indian Affairs, the Small Tribes Initiative. This program will provide financial support necessary to allow these tribes to develop basic tribal administrative and management capabilities.

In keeping with the government-to-government relationship, Indian tribes are defined by law as eligible entities and receive direct funding, if they wish, in five block grant programs administered by the Department of Health and Human Services. These and other blocks to the states consolidated dozens of categorical federal domestic assistance programs to reduce fragmentation and overlap, eliminate excessive federal regulation, and provide for more local control. This Administration now proposes that Indian tribes be eligible for direct funding in the Title XX social services block, the block with the largest appropriation and the greatest flexibility in service delivery.

In addition, we are moving the White House liaison for federally-recognized tribes from the Office of Public Liaison to the Office of Intergovernmental Affairs, which maintains liaison with state and local governments. In the past several administrations, tribes have been placed along with vital interest groups, such as veterans, businessmen and religious leaders. In moving the tribal government contact within the White House Intergovernmental Affairs staff, this Administration is underscoring its commitment to recognizing tribal governments on a government-to-government basis.

Further, we are recommending that the Congress expand the authorized membership of the Advisory Commission on Intergovernmental Relations (42 U.S.C. 4273) to include a representative of Indian tribal governments. In the interim before Congressional action, we are requesting that the Assistant Secretary for Indian Affairs join the Commission as an observer. We also supported and signed into law the Indian Tribal Governmental Tax Status Act which provides tribal governments with essentially the same treatment under federal tax laws as applies to other governments with regard to revenue raising and saving mechanisms.

In addition, this Administration calls upon Congress to replace House Concurrent Resolution 108 of the 83rd Congress, the resolution which established the now discredited policy of terminating the federal-tribal relationship. Congress has implicitly rejected the termination policy by enacting the Indian Self-Determination and Education Assistance Act of 1975. However, because the termination policy declared in H. Con. Res. 108 has not been expressly and formally repudiated by a concurrent resolution of Congress, it continues to create among the Indian people an apprehension that the United States may not in the future honor the unique relationship between the Indian people and the federal government. A lingering threat of termination has no place in this Administration's policy of self-government for Indian tribes, and I ask Congress to again express its support of self-government.

These actions are but the first steps in restoring control to tribal governments. Much more needs to be done. Without sound reservation economies, the concept of self-

government has little meaning. In the past, despite good intentions, the federal government has been one of the major obstacles to economic progress. This Administration intends to remove the impediments to economic development and to encourage cooperative efforts among the tribes, the federal government and the private sector in developing reservation economies.

Development of Reservation Economies

The economies of American Indian reservations are extremely depressed with unemployment rates among the highest in the country. Indian leaders have told this Administration that the development of reservation economies is their number one priority. Growing economies provide jobs, promote self-sufficiency, and provide revenue for essential services. Past attempts to stimulate growth have been fragmented and largely ineffective. As a result, involvement of private industry has been limited, with only infrequent success. Developing reservation economies offers a special challenge: devising investment procedures consistent with the trust status; removing legal barriers which restrict the type of contracts tribes can enter into and reducing the numerous and complex regulations which hinder economic growth.

Tribes have had limited opportunities to invest in their own economies because often there has been no established resource base for community investment and development. Many reservations lack a developed physical infrastructure including utilities, transportation and other public services. They also often lack the regulatory, adjudicatory and enforcement mechanisms necessary to interact with the private sector for reservation economic devel-

opment on the reservation offers potential for tribes and individual entrepreneurs in manufacturing, agribusiness and modern technology, as well as fishing, livestock, arts and crafts and other traditional livelihoods.

Natural resources such as timber, fishing and energy provide an avenue of development for many tribes. Tribal governments have the responsibility to determine the extent and the methods of developing the tribe's natural resources. The federal government's responsibility should not be used to hinder tribes from taking advantage of economic development opportunities.

With regard to energy resources, both the Indian tribes and the nation stand to gain from the prudent development and management of the vast coal, oil, gas, uranium and other resources found on Indian lands. As already demonstrated by a number of tribes, these resources can become the foundation for economic development on many reservations while lessening our nation's dependence on imported oil. The federal role is to encourage the production of energy resources in ways consistent with Indian values and priorities. To that end, we have strongly supported the use of creative agreements such as joint ventures and other non-lease agreements for the development of Indian mineral resources.

It is the free market which will supply the bulk of the capital investments required to develop tribal energy and other resources. A fundamental prerequisite to economic development is capital formation. The establishment of a financial structure that is a part of the Indian reservation community is essential to the development of Indian capital formation.

Federal support will be made available to tribes to assist them in developing the necessary management capability and in attracting private capital. As a first step in that direction, we provided funds in the FY 1983 budget to provide seed money to tribes to attract private funding for economic development ventures on reservations. As more tribes develop their capital resource base and increase their managerial expertise, they will have an opportunity to realize the maximum return on their investments and will be able to share an increasing portion of the business risk.

It is the policy of this Administration to encourage private involvement, both Indian and non-Indian, in tribal economic development. In some cases, tribes and the private sector have already taken innovative approaches which have overcome the legislative and regulatory impediments to economic progress.

Since tribal governments have the primary responsibility for meeting the basic needs of Indian communities, they must be allowed the chance to succeed. This Administration, therefore, is establishing a Presidential Advisory Commission on Indian Reservation Economies. The Commission, composed of tribal and private sector leaders, is to identify obstacles to economic growth in the public and private sector at all levels; examine and recommend changes in federal law, regulations and procedures to remove such obstacles; identify actions state, local and tribal governments could take to rectify identified problems; and recommend ways for the private sector, both Indian and non-Indian, to participate in the development and growth of reservation economies. It is also to be charged with the

responsibility for advising the President on recommended actions required to create a positive environment for the development and growth of reservation economies.

Numerous federal agencies can offer specialized assistance and expertise to the tribes not only in economic development, but also in housing, health, education, job training, and other areas which are an integral part of reservation economies. It is to the advantage of the tribes, and in the interest of the taxpayers, that the federal role be fully reviewed and coordinated. Therefore, this Administration directs the Cabinet Council on Human Resources to act as a mechanism to ensure that federal activities are non-duplicative, cost effective, and consistent with the goal of encouraging self-government with a minimum of federal interference.

Summary

This Administration intends to restore tribal governments to their rightful place among the governments of this nation and to enable tribal governments, along with state and local governments, to resume control over their own affairs.

This Administration has sought suggestions from Indian leaders in forming the policies which we have announced. We intend to continue this dialogue with the tribes as these policies are implemented.

The governmental and economic reforms proposed for the benefit of Indian tribes and their members cannot be achieved in a vacuum.

This nation's economic health—and that of the tribes—depends on adopting this Administration's full Economic

Recovery Program. This program calls for eliminating excessive federal spending and taxes, removing burdensome regulations, and establishing a sound monetary policy. A full economic recovery will unleash the potential strength of the private sector and ensure a vigorous economic climate for development which will benefit not only Indian people, but all other Americans as well.

REAGAN ADMINISTRATION INDIAN POLICY INITIATIVES

— Request that Congress repudiate House Concurrent Resolution 108 of the 83rd Congress which called for termination of the federal-tribal relationship. The Administration wants this lingering threat of termination replaced by a resolution expressing its support of a government-to-government relationship.

— Ask Congress to expand the authorized membership of the Advisory Commission on Intergovernmental Relations to include a representative of Indian tribal governments. In the interim, request that the Assistant Secretary of the Interior for Indian Affairs join the ACIR as an observer.

— Move the White House liaison for federally-recognized tribes from the Office of Public Liaison to the Office of Intergovernmental Affairs.

— Establish a Presidential Advisory Commission on Indian Reservation Economies to identify obstacles to economic growth and recommend changes at all levels; recommend ways to encourage private sector involvement, and advise the President what actions are needed to create a positive environment for the development and growth of reservation economies.

— Support direct funding to Indian tribes under the Title XX social services block grant to states.

— Sought and obtained funds for FY 1983 to implement the Small Tribes Initiative to provide financial support needed to allow small tribes to develop basic tribal administrative and management capabilities.

— Sought and obtained funds for FY 1983 to provide seed money for tribes for economic development ventures on reservations.

— Supported and signed into law the Tribal Governmental Tax Status Act which will provide tribal governments with the same revenue raising and saving mechanisms available to other governments.

— Support the use of creative agreements such as joint ventures and other non-lease agreements for the development of Indian mineral resources.

— Direct the Cabinet Council on Human Resources to act as a review and coordination mechanism to ensure that federal activities are non-duplicative, cost effective and consistent with the goal of encouraging tribal self-government with a minimum of federal interference.

(3) (3)

Nos. 85-615 and 85-639

Supreme Court, U.S.
FILED
FEB 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA DEPARTMENT OF TRANSPORTATION,
PETITIONERS

v.

NAEGELE OUTDOOR ADVERTISING COMPANY
OF CALIFORNIA, INC.

DESERT OUTDOOR ADVERTISING, INC., PETITIONER

v.

NAEGELE OUTDOOR ADVERTISING COMPANY
OF CALIFORNIA, INC.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Highway Beautification Act of 1965 authorizes the states and third parties to seek enforcement of state laws regulating outdoor advertising, where the alleged violations occur on tribal trust lands located within a federal Indian reservation and are pursuant to a duly-approved agreement between the Indian tribe and a non-Indian lessee.

2. Whether, if the Highway Beautification Act does not make state laws regulating outdoor advertising enforceable on reservation trust lands, such state laws may nevertheless be enforced on such lands.

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No. 85-639

DESERT OUTDOOR ADVERTISING, INC., PETITIONER

v.

NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Title I of the Highway Beautification Act of 1965 (HBA), Pub. L. No. 89-285, 79 Stat. 1028, 23

U.S.C. 131, implements Congress's finding that "the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate Systems and the [federal-aid] primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. 131(a).[1]

Subsection (b) of Section 131 provides that if the Secretary of Transportation determines that a state has not provided for the "effective control" of outdoor advertising along Interstate highways, federal-aid highway funds apportioned to that state shall be reduced by 10% until the state does provide for such control.[2] Subsection (c) defines the term "effective control" to limit permissible billboards to five specific categories: (*i.e.*, directional and official signs, landmark signs and notices, signs advertising sale or lease of the property upon which they are located or advertising activities conducted on that property, and free coffee signs).[3] The Secretary is, however,

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[1] The four federal-aid highway systems, defined in 23 U.S.C. 103(a), include the primary and secondary systems, the urban system, and the Interstate System. The primary system consists of "an adequate system of connected main highways" selected by the state and approved by the Secretary of Transportation. Although Section 131 applies to both the primary system and the Interstate System, for simplicity herein we will refer simply to the Interstate System, which is the only one involved in this case.

[2] Subsection (*l*) provides, in substance, that a state may seek judicial review of the Secretary's final determination to withhold funds.

[3] The federal government will pay 75% of the just compensation for the removal of any outdoor sign lawfully

directed to provide, in consultation with the states, for areas in which other signs "giving specific information in the interest of the traveling public may be erected and maintained" (23 U.S.C. 131(f)). Such signs must conform to national standards to be promulgated by the Secretary (see 23 C.F.R. Pt. 750).[4] Finally, Subsection (h)—the provision at issue in this case—states:

> All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

2. As summarized by the court below, the evidence shows that the Morongo Band of Mission Indians, a federally-recognized Indian tribe, occupies the Morongo Indian Reservation, which consists of approximately 39,300 acres in Riverside County, California. The Reservation was created by a series of seven executive orders, a presidential proclamation, and a trust patent issued pursuant to the Mission Indian Relief Act of 1891, ch. 65, 26 Stat. 712. The Morongo Reservation lies astride a narrow pass between the San Bernardino and San Jacinto Mountain Ranges. Only a small portion of the Reservation is located on relatively flat land suitable for commercial develop-

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erected under state law but not permitted under 23 U.S.C. 131(c). See 23 U.S.C. 131(g). Subsection (k) provides that "[s]ubject to compliance with" the just compensation provision, a state may establish standards imposing stricter limitations than those required by the HBA.

[4] The HBA also specifies certain other exceptions to the general sign prohibition of Subsection (c). See Subsections (d), (e), (i), (n) and (o).

ment. These few acres are adjacent to Interstate Highway 10, connecting the Los Angeles area with the eastern part of the state. The Reservation's few natural resources yield little income, and many of the Morongo are unemployed and live in poverty. Pet. App. 14a-15a.[5]

For many years, the Band has derived a major part of its income from outdoor advertising. The Morongo[6] have determined that the highest and best use of the land adjacent to Interstate 10 is for outdoor advertising. This conclusion was confirmed by an appraisal report prepared by the Bureau of Indian Affairs of the Department of the Interior (BIA) in 1977. Pet. App. 14a-15a. The Morongo leased some Reservation land to non-Indian firms for billboards before 1977; in that year, proposals for further leases were solicited from several non-Indian firms, including respondent. Respondent's proposal was selected, and the proposed lease was submitted to the BIA for approval pursuant to 25 U.S.C. 415.[7] Pet. App. 15a-16a.

The Sacramento Area Director of the BIA initially denied approval on the grounds that the outdoor advertising contemplated by the proposed lease would violate the HBA and California's Outdoor Advertising Act, Bus. & Prof. Code § 5200 *et seq.* (West 1974). The Morongo appealed the Area Director's decision, and the Interior Board of Indian Appeals

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[5] "Pet. App." references are to the appendix in No. 85-615.

[6] References to the Morongo refer either to the general membership of the band or to their Tribal Council, authorized by the membership to negotiate advertising agreements (Pet. App. 15a).

[7] Section 415 requires the approval of the Secretary of the Interior for leases of restricted Indian lands.

reversed. *Morongo Band of Mission Indians* v. *Area Director*, 7 I.B.I.A. 299, 86 Interior Dec. 680 (1979) (85-639 Br. in Opp. App. 1). The Board concluded that the HBA and the California statute had no application on reservation trust lands. Accordingly, the Board remanded the matter to the BIA with instructions to seek to effectuate the proposed lease. Pet. App. 16a.

On March 30, 1978, during the pendency of the administrative appeal, the Morongo and respondent executed an "agency agreement" by which respondent agreed to erect 15 billboards on the Reservation and to pay the Morongo $60,000 for the right to be their agent and $250,000 ($25,000 per year for 10 years) for the privilege of operating the billboards (85-615 Br. in Opp. 3). Respondent then erected 16 billboards on the Reservation.[8] The agreement was ultimately submitted to the BIA, and approved under 25 U.S.C. 415 on February 2, 1984, retroactive to 1978 (Pet. App. 16a n.1). The agreement was deemed by the BIA to be a lease replacing the earlier proposed lease which was the subject of the administrative appeal. *United States ex rel. Buxbom* v. *Naegele Outdoor Advertising Co.*, 739 F.2d 473 (9th Cir. 1984), cert. denied, No. 84-709 (Jan. 7, 1985).

3. On July 10, 1978, the State of California commenced an action in the Superior Court of Riverside County seeking preliminary and permanent injunctions against respondent. The State's complaint alleged that respondent was in control of 16 outdoor advertising structures located adjacent to Interstate

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[8] Counsel for the respondent has advised us that, in addition to the 15 billboards contemplated by the 1978 agreement, one additional billboard was erected on Reservation land under a separate agreement between respondent and the Morongo.

Highway 10 in Riverside County, which were displayed without the permits required by Section 5350 of the California Business and Professions Code (West 1974). The complaint further alleged that the displays were situated in violation of various provisions of the State's Outdoor Advertising Act (*id.* §§ 5200 *et seq.*), and that they constituted a public nuisance within the meaning of Section 5461 of the Business and Professions Code (West 1974). Pet. App. 17a. The superior court, on November 6, 1981, entered summary judgment in favor of the State. *Ibid.*

Petitioner Desert Outdoor Advertising, Inc., also filed an action in the superior court against respondent, which was subsequently consolidated with the State's action. Petitioner Desert alleged causes of action for nuisance, unfair competition, intentional interference with prospective economic benefit and negligent interference with such benefit. Respondent's demurrer was sustained as to the nuisance action and both causes of action for interference were dismissed, but the district court granted Desert's motion for summary judgment on the unfair competition cause of action.[9] In its order, the court enjoined respondent from maintaining advertising structures on the Reservation without complying with the Outdoor Advertising Act, and ordered respondent to remove all noncomplying structures. Pet. App. 17a-18a. Enforcement of the judgment was stayed pending appeal. Pet. App. 18a.

The state appellate court affirmed (Pet. App. 47a-66a). It concluded that federal law did not preempt the State from enforcing its Outdoor Advertising Act

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[9] Cal. Bus. & Prof. Code § 17200 (West Supp. 1986) defines "unfair competition" to include an unlawful business practice (Pet. App. 31a).

on federal Indian Reservations. In reaching this conclusion, the court found that "the Highway Beautification Act specifically contemplated and authorized states to regulate outdoor advertising on Indian lands adjacent to Interstate Highways." Pet. App. 63a. The court also rejected respondent's contention that the action must be dismissed for failure to join an indispensable party, the Morongo Band. Pet. App. 64a-66a.

The California Supreme Court reversed (Pet. App. 13a-34a). Relying upon this Court's decisions in *Hancock* v. *Train*, 426 U.S. 167 (1976) and *EPA* v. *State Water Resources Control Board*, 426 U.S. 200 (1976), the court held that a "clear and unambiguous [congressional] mandate" was required to permit the State to enforce its outdoor advertising restrictions on structures located on federal lands. Examining the text of the HBA—including Subsection (h)—and the legislative history of the Act, the court found no authorization for the enforcement of state laws on such lands. Accordingly, it concluded that "even if Congress intended the outdoor advertising standards of the Highway Beautification Act to apply on Indian Reservations, it did not intend that these standards be enforced through the assertion of state power." Pet. App. 27a.[10] Instead, the court found that the HBA "reserved to federal authorities the responsi-

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[10] The court also ruled that the Act of Aug. 15, 1953, ch. 505, 67 Stat. 589, 28 U.S.C. 1360 (Pub. Law 280), which provides (inter alia) for California state court jurisdiction over private civil litigation involving Reservation Indians (see *Bryan* v. *Itasca County*, 426 U.S. 373 (1976)), does not authorize the State to enforce its Outdoor Advertising Act on Indian Reservation land. Pet. App. 27a-28a. Neither petition seeks review of any issues regarding Public Law 280.

bility for enforcing the act's provisions upon federal lands and reservations," and thus preempted state regulation. *Id.* at 30a-31a. As further support for its preemption ruling, the court noted that Congress has granted the Secretary of the Interior authority to supervise the leasing of Indian lands, and that the Secretary has issued extensive regulations pursuant to that authority. *Id.* at 30a n.9.[11]

DISCUSSION

The decision below does not conflict with that of any federal court or other state supreme court, and does not present any issue warranting review by this Court. Accordingly, certiorari should be denied.

1. The initial question presented in the petition filed by Desert Outdoor Advertising, Inc.—whether the provisions of the HBA extend to Indian Reservations—was not considered or decided in these consolidated actions by any of the courts below and, hence, is not properly before this Court. Contrary to petitioner Desert's implications, none of the California courts in these proceedings determined whether the requirements of the HBA, itself, are applicable to federal Indian Reservations. Rather, the federal statutory issue that those courts considered was whether the HBA (most particularly, Subsection (h)) makes *state* laws regulating outdoor advertising applicable to, and enforceable on, federal Indian Reservations—a distinctly different question. Thus, the California Court of Appeal characterized the issue before it as follows (Pet. App. 54a):

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[11] In light of its resolution of the other issues, the court found it unnecessary to consider respondent's indispensable party argument. The court subsequently modified its opinion in certain respects not material here (Pet. App. 40a-41a).

> The lower court in both cases concluded the [California] Outdoor Advertising Act was applicable in its summary judgment rulings. This appeal therefore raises the issue of whether the [California] Outdoor Advertising Act applies to a non-Indian company acting pursuant to an agency agreement providing for the construction and maintenance of advertising display devices on reservation land held in trust by the United States for the beneficial use of the Morongo Band Mission Indians.

The court cast the issue entirely in terms of whether state law requirements applied; no consideration whatsoever was given to whether any restrictions were imposed by the HBA itself. Moreover, the Supreme Court of California expressly refused to decide whether the requirements of the HBA are applicable on the lands at issue. Pet. App. 21a-22a.[12]

2. Petitioner Desert also argues (Pet. 9-17) that the HBA impliedly authorizes enforcement of state statutes on federal Indian Reservations, and that respondent's posting of billboards on the Morongo Reservation is accordingly unlawful competition under California law. The Supreme Court of California correctly rejected this argument.

Where, as here, a party is carrying out an activity on federal lands pursuant to specific federal authori-

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[12] There is, accordingly, no occasion in this case to consider whether the federal statute, standing alone, creates an implied private right of action enforceable by the State or Desert in the context of this case. The courts that have considered the issue have held, correctly in our view, that the HBA does not create an implied right of action. See *National Advertising Co.* v. *City of Ashland*, 678 F.2d 106, 109 (9th Cir. 1982); *Parks* v. *Donrey, Inc.*, 596 F. Supp. 347 (W.D. Ark. 1984).

zation, state regulation prohibiting or substantially burdening such activities will be allowed only where the federal government has clearly consented to such state regulation. As this Court stated in *Hancock* v. *Train*, 426 U.S. 167, 179 (1976) (citations and footnotes omitted):

> [W]here "Congress does not affirmatively declare its instrumentalities or property subject to regulation," "the federal function must be left free" of regulation. Particular deference should be accorded that "old and well-known rule" where, as here, the rights and privileges of the Federal Government at stake not only find their origin in the Constitution, but are to be divested in favor of and subjected to regulation by a subordinate sovereign. Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous."

Petitioner Desert discerns the required "clear and unambiguous" congressional consent to state regulation in Subsection (h) of the HBA, which states that "[a]ll public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary." As the court below correctly observed, however, Subsection (h) provides only that advertising "shall be controlled", without specifying whether such control shall be exercised by federal land man-

agers or the states. In light of this inescapable ambiguity, the Supreme Court of California correctly resolved the issue in favor of exclusive federal control. Pet. App. 21a-27a.

Moreover, the legislative history of the HBA—far from dispelling this ambiguity in petitioner's favor—provides further support for the State Supreme Court's conclusion. The statutory predecessor to the HBA (Section 122 of the Federal-Aid Highway Act of 1956, ch. 462, 70 Stat. 387, as added by Section 12 of the Federal-Aid Highway Act of 1958, Pub. L. No. 85-381, 72 Stat. 95, codified by the Act of Aug. 27, 1958, Pub. L. No. 85-767, 72 Stat. 885 *et seq.* (23 U.S.C. (1959 ed.) 131)) like the present HBA, contemplated that the states, rather than the federal government directly, would generally undertake the actual task of regulating outdoor advertising along the Interstate highway system. As an exception to this general policy, however, the 1958 Act clearly indicated that Congress did not intend state regulation to extend to federal lands and Reservations. Section 12, 72 Stat. 96 (§ 122(d)) of that Act provided:

> Whenever any portion of the Interstate System is located upon or adjacent to any public lands or reservations of the United States, the Secretary of Commerce may make such arrangements and enter into such agreements with the agency having jurisdiction over such lands or reservations as may be necessary to carry out the national policy set forth in subsection (a) of this section, and any such agency is hereby authorized and directed to cooperate fully with the Secretary of Commerce in this connection.

In 1965, Congress replaced the former Section 122 with the present HBA. Like its statutory predecessor,

the HBA generally provided that the states, rather than the federal government, would directly regulate outdoor advertising. As to federal lands and Reservations, however, the new statute stated only that outdoor advertising on such properties "shall be controlled" in accordance with the provisions of the HBA and the national regulations promulgated pursuant to that statute. There is no suggestion in the legislative history of the new HBA that Congress intended to alter the established practice by which federal land managers, rather than the states, are responsible for controlling outdoor advertising on the public lands. Instead, Congress evidently intended to alter prior practice only to the extent that the substantive standards embodied in the HBA (and the national regulations promulgated thereunder by the Secretary) would henceforth be generally applicable on the federal lands without any need for prior interagency agreements. Thus, the House Report states that "[t]his section simply extends to all public lands and reservations of the United States which are adjacent to any portion of the Interstate System or the primary system the same controls covering other roads which are subject to this legislation." H.R. Rep. 1084, 89th Cong., 1st Sess. 8 (1965). If, in enacting the HBA, Congress had intended to make a significant change in the existing system by giving the states, rather than the responsible federal agency, the authority to control outdoor advertising on the federal lands, it would surely have referred to such an unusual transfer of authority, instead of merely noting, as it did, that the new provision "simply" extends the controls of the HBA to federal lands.[13]

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[13] Moreover, as the court below noted (Pet. App. 26a-27a), the enforcement scheme of the Act, which relies on the state

3. Petitioner State of California, in contrast to Desert, does not contend that the HBA authorizes it to apply its laws regulating outdoor advertising on Indian Reservation trust lands. Rather, the State apparently asserts an "inherent power" (85-615 Pet. i) to apply such laws within federal Indian Reservations that is not preempted by the HBA. Again, the court below properly rejected this contention.

This Court has clearly indicated that state laws may not be applied to activities of non-Indians on an Indian Reservation where " 'such application would interfere with Reservation self-government or would impair a right granted or reserved by federal law.' " *Rice* v. *Rehner*, 463 U.S. 713, 718 (1983), quoting *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973). Thus, while one goal of the judicial inquiry is to determine the congressional plan, the concept of tribal sovereignty is also to be given substantial weight; this Court will not necessarily apply "those standards of pre-emption that have emerged in other areas of the law." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980). Instead, the Court has "employed a pre-emption analysis that is informed by historical notions of tribal sovereignty," although not "determined by them." *Rice* v. *Rehner*, 463 U.S. at 718.[14]

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powers of zoning and eminent domain, is inconsistent with an intent that state laws be enforced on Indian reservation trust lands, where the states do not have such powers.

[14] Where the state attempts to exercise authority over non-Indians conducting business on the Reservation, the Reservation boundary "remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. at 151.

There is no definitive formula for determining whether a state may exercise authority over on-Reservation activities of non-Indians. *Ramah Navajo School Bd.* v. *Bureau of Revenue*, 458 U.S. 832, 837 (1982). Rather, the issue must be determined by a particularized examination and analysis of the various state, federal and tribal interests at stake. 458 U.S. at 838. In particular, the pervasiveness of federal regulation of the activity in question will be considered in determining whether state regulation has been preempted; the presence of an extensive federal regulatory scheme ordinarily indicates that " 'no room remains for state laws imposing additional burdens * * *.' " *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U.S. 160, 163-164 (1980), quoting *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 690 (1965).

The balance here weighs heavily against state regulation. In essence, the State maintains that it may regulate the purposes for which the Morongo, with the approval of the Department of the Interior, may lease tribal lands. The federal laws and regulations governing the leasing of Indian lands, however, are so comprehensive that "no room remains for state laws imposing additional burdens." The leasing of Indian lands has traditionally been the province of the federal government—indeed, the existence of federal restrictions upon the leasing of Indian lands has been a fundamental aspect of federal Indian law for almost 200 years. See Section 4 of the Act of July 22, 1790, ch. 33, 1 Stat. 138; Section 12 of Act of May 19, 1796, ch. 30, 1 Stat. 472. Federal law today provides for comprehensive approval authority over such leasing by the Secretary of the Interior. Thus, 25 U.S.C. 415(a) generally requires Secretarial approval for a

lease of restricted Indian lands and provides that "all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior." See also 25 U.S.C. 380, 393, 393a, 394, 395, 397, 402, 402a, 403, 403a, 403b, 403c. 415a, 415b, 415c, 415d, 477 and 635. Pursuant to these statutory authorizations, the Secretary of the Interior has promulgated extensive regulations governing the leasing of Indian lands. See 25 C.F.R. Pt. 162.

In short, the federal regulatory scheme concerning the leasing of restricted Indian lands is at least as comprehensive as the various federal regulatory programs concerning Indian education, trading with the Indian tribes, or logging on Indian lands, all of which this Court has determined to be so extensive as to preempt state regulation. See *Ramah Navajo School Bd.* v. *Bureau of Revenue, supra; Central Machinery Co.* v. *Arizona Tax Comm'n, supra; White Mountain Apache Tribe* v. *Bracker, supra.* Accordingly, the Supreme Court of California rightly concluded that California laws regulating outdoor advertising may not be enforced against respondent, a duly approved lessee of restricted Indian lands.[15]

4. In any event, this case does not present a question of sufficient importance to warrant review by this Court at this time. The State has made no showing, beyond unsubstantiated suggestions, that the presence of billboards on Indian reservations is a recurring and serious problem threatening the State's

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[15] Indeed, the State's contention that erection of these billboards is prohibited by state law would effectively nullify the Secretary's approval of the lease for the specific purpose of erecting them. In this context, the application of state law would not merely burden the federally approved activity, it would completely override the federal approval.

essential regulatory interests or otherwise presenting genuinely significant state concerns.[16] Indeed, the petitions fail to mention a single case beyond the Morongo Reservation where a similar problem has arisen, and we are aware of none. Nor does the decision below threaten the achievement of the policies furthered by the HBA. All leases of restricted Indian lands are subject to the approval of the Secretary of the Interior. Regardless of whether the HBA is technically applicable to Indian Reservation lands, the Secretary may take the federal policies expressed in the HBA into account when a proposed lease is submitted to him for approval, and may reject it on the ground that it is contrary to federal policy. See *Moapa Band of Paiute Indians* v. *United States Dep't of Interior*, 747 F.2d 563 (9th Cir. 1984) (upholding Interior's rejection of proposed tribal ordinance permitting brothels, on ground of general federal policy disfavoring prostitution).[17] Hence, the Secretary of the Interior can protect the interests of the general

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[16] There is absolutely no basis for petitioner Desert's suggestion (Pet. 11-13) that the Secretary of Transportation would attempt to reduce a state's share of federal highway funding for not controlling outdoor advertising on federal lands and reservations. In any event, Subsection (*l*) of the HBA provides for judicial review—necessarily including the possibility of review by this Court—of any such proposed reduction.

[17] Section 415(a) specifically requires that, before approving a lease, "the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality and safety of any structures or other facilities to be constructed on such lands; * * * and the effect on the environment of the uses to which the leased lands will be subject."

public and implement federal statutory policy in this area.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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